14-848

No. ____

SUPREME COURT, U.S.
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IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

JAMES KULBICKI,
Respondent.

On Petition for Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

BRIAN E. FROSH
Attorney General of Maryland

BRIAN S. KLEINBORD*
MARY ANN RAPP INCE
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6435
bkleinbord@oag.state.md.us

Counsel for Petitioner

**Counsel of Record*

QUESTION PRESENTED

Does an appellate court violate the core principles of *Strickland v. Washington* when it conducts a post-hoc assessment of trial counsel's performance based on scientific advances not available at the time of trial?

PARTIES TO THE PROCEEDING

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *James Kulbicki v. State of Maryland*, 440 Md. 33, 99 A.3d 730 (2014), reversing the judgment of the Court of Special Appeals of Maryland, is reproduced in Appendix A. (App. 1a-57a). The Corrected Order of the Court of Appeals of Maryland dated October 21, 2014, *James Kulbicki v. State of Maryland*, No. 13, September Term, 2013, denying Maryland's motion for reconsideration and stay of mandate is reproduced in Appendix B. (App. 58a).

The reported opinion of the Court of Special Appeals of Maryland, *James Kulbicki v. State of Maryland*, 207 Md. App. 412, 53 A.3d 361 (2012), affirming the judgment of the Circuit Court for Baltimore County, Maryland, denying post conviction relief is reproduced in Appendix C. (App. 59a-114a).

The unreported decision of the Circuit Court for Baltimore County, Maryland, Case No. 03-K-93-530, *State of Maryland v. James Allen Kulbicki*, denying Kulbicki's petition for post conviction relief, is reproduced in Appendix D. (App. 115a-167a).

STATEMENT OF JURISDICTION

The order of the Court of Appeals of Maryland, denying Petitioner's motion for reconsideration of the decision reversing the judgment of the Court of Special Appeals, was filed on October 21, 2014. This petition is

filed within 90 days of the filing of the denial of rehearing, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 20, 1993, Respondent James Allen Kulbicki was convicted of first degree murder in the Circuit Court for Baltimore County, Case No. K-93-530. On direct appeal the conviction was reversed and the case remanded for a new trial. *Kulbicki v. State*, 102 Md. App. 376, 649 A.2d 1173 (1994), *cert. denied*, 337 Md. 706, 655 A.2d 911 (1995). Following his conviction in his second trial in 1995 for first degree murder and a related handgun charge, Kulbicki's convictions were affirmed in an unreported opinion, *Kulbicki v. State*, No. 385, September Term, 1996 (filed December 20, 1996), *see Kulbicki v. State*, 112 Md. App. 771, ___ A.2d ___ (1996) (table), after which the Court of Appeals denied Kulbicki's petition for certiorari review. *Kulbicki v. State*, 345 Md. 236, 691 A.2d 1312 (1997).

Petitioner Kulbicki, a married Baltimore City Police Officer, was convicted of first degree murder in connection with the death of Gina Marie Nueslein, his girlfriend, who was seeking child support from Kulbicki for their 18-month-old son. *Kulbicki*, 207 Md. App. at 416-21, 53 A.3d at 363-67. (*See* App. 60a, 62a-76a, 116a-129a). Ms. Nueslein was last seen by her mother at 3:30 on Saturday afternoon, January 9, 1993. Her body was found in Gunpowder State Park at 8:00 on Sunday morning, January 10, 1993, by a man who was walking his dog. 207 Md. App. at 418-21, 53 A.3d at 364-67 (App. 62a-63a).

Trial proceedings

The testimony at trial established that at about 8:00 in the morning of January 10th, Walter Kutcha took his dog for a run near the archery range in Gunpowder State Park where he discovered a body lying behind one of the trash cans. Kutcha drove to the ranger's cabin in the park and then returned to the body with Park Ranger Ross Harper. The body was that of a young woman, lying on her back. (*Id.*).

Police responded to the park at approximately 8:30 a.m. Detective William Ramsey, whose training and experience were described to the jury, testified that he arrived on the scene at about 10:18 a.m. He noted that the victim's jewelry had not been removed. Turning her body over, Ramsey discovered a wound near the back of her head. Ramsey did not see any blood on the ground under the victim's head, even though the right side of her jacket was soaked with blood. Based on the leaves and debris under her jacket, the position of her clothes and arms, and the disturbance in the leaves and debris in an area leading toward the body, as well as the absence of bullets, shell casings or any other disturbance on the surrounding ground, Detective Ramsey concluded that the victim had been killed elsewhere and that her body had been dumped and then dragged to the area where it was found. (*Id.*).

Under her jacket, the victim was wearing a Royal Farm Store smock with "Gina" on the name tag. After Ramsey learned that the Baltimore City police were "investigating a missing girl," Edward Schmitt, a Lieutenant in the Baltimore City Police Department

and a relative of the missing woman, came to the scene. At about twelve noon, Schmitt identified the body as that of Gina Marie Neuslein. Testimony established that Gina was last been seen by her mother as she walked toward work at the Royal Farm Store at 3:30 Saturday afternoon, January 9. Based on information they had received, at about 3:00 on Sunday afternoon, Ramsey and his partner, Detective Robert Capel, went to James Kulbicki's home in Baltimore City and asked him about Gina's whereabouts. 207 Md. App. at 418-21, 53 A.3d at 367-67 (App. 63a-65a).

Kulbicki, a Baltimore City police sergeant, said that Gina and he were "very good friends" and, without being asked, added that "they've never had a sexual relationship." Kulbicki claimed that he had last seen Gina on Friday, January 8, when he picked her up close to her house and drove her to work at the Royal Farm Store. He said that he last spoke to Gina when she called him during his midnight shift that Friday night. When Capel informed Kulbicki that police had found Gina's body, Kulbicki replied that he had figured as much because the Baltimore County police officers were from the Homicide Squad. After being told that Gina was dead, Kulbicki never asked where or how she had been killed. 207 Md. App. at 420-21, 53 A.3d at 366-67 (App. 65a-66a).

Questioned about a paternity hearing scheduled for the following Wednesday and about genetic tests showing that Kulbicki was the father of Gina's 18-month-old child, Kulbicki stated, "Well, that's absolutely impossible that I'm the father." Kulbicki

said that he "didn't believe in genetic tests" and opined that "the only reason why they'd even be closest [sic]" was because Gina and he were "both Slavic." 207 Md. App. at 420-21, 53 A.3d at 366-67 (App. 66a, 121a-122a).

Earlier, at about 11:30 Sunday morning, while he was still at Gunpowder Park, Detective Ramsey had received word that "there was an individual who might have some information relative to the crime that we were investigating." Ramsey sent an officer to interview the witness, Barbara Clay. Clay testified at trial that she had driven her son to the archery range at Gunpowder State Park at approximately 3:00 Saturday afternoon, January 9. At about 4:00 p.m., as they were leaving the parking area, Clay saw a black long-bed Ford pickup truck, with no customizing and no cap, "coming slow." As the truck was turning into the parking area, it was parallel to Clay's vehicle and about four feet away. Clay, who had her window down, said "Hi"; the other driver looked at her "full face" but did not respond. Before the jury, Clay identified the driver as Kulbicki. 207 Md. App. at 418-21, 53 A.3d at 364-67 (App. 63a-65a, 121a).

Clay and her son then parked about one-third mile down the road from the archery range for about 15 minutes, hoping to see deer. Clay did not see Kulbicki's truck leave, nor did she see any other vehicles enter the area. She learned about the discovery of a body as she watched the television news the next morning. She contacted the police and described the truck and driver, relating information that was not provided on the news. Clay stated to

police that the driver was a dark-haired, white male in his mid-thirties, wearing a dark jacket over a lighter shirt. On January 13, Clay saw a television broadcast showing Kulbicki, who had been arrested for Gina's murder. Explaining that the man she had seen at the Park had "a very distinctive profile, a very distinctive nose," Clay recalled: "And when I saw him on TV, without doubt, I knew that was the man that I saw at Gunpowder State Park." (*Id.*).

Assistant Medical Examiner James Locke testified at trial that the victim was a 22-year-old white female; the cause of death was a gunshot wound to her head. The abrasions on her body and the condition of her clothing were consistent with her body having been dragged over the ground. Although time of death could not be precisely determined, Locke's findings were consistent with a time of 4:00 or 5:00 p.m. on Saturday, January 9. The fatal bullet had traveled from front to back and left to right through the victim's head. Evidence of burning on her scalp indicated that the gun barrel had been placed directly against her head. The keyhole fracture at the entrance wound indicated "that the bullet entered at a very sharp angle and not directly perpendicular to the skull or to the scalp. It entered such that a portion of the skull entered into the brain and, also, a portion of skull may have exited from the body." Locke recovered one bullet fragment; there was an exit wound from which additional bullet fragments, as well as skull fragments, could have exited the skull. Extensive bleeding and bruising under the scalp on the right side of the victim's head indicated that her head had hit a hard surface. Dr. Locke testified that the evidence from the autopsy was

consistent with a driver shooting the passenger of a car. 207 Md. App. at 422-23, 53 A.3d at 367-68 (App. 68a-69a, 121a).

Dr. Forbes, a defense expert on post conviction, agreed that Locke's time estimate was not inconsistent with the evidence. Dr. Forbes also agreed that a gunshot wound to the head generally produces a "fair amount of blood at the scene." (App. 128a-129a).

When police first interviewed Kulbicki, his black king cab Ford pickup was parked outside his house. Later that Sunday afternoon, pursuant to a warrant, the police seized, *inter alia*, that truck, a denim work jacket taken from Kulbicki's hall closet, and a fully loaded .38 snub-nose Smith and Wesson revolver with a two-inch barrel and a leather holster. 207 Md. App. at 421, 53 A.3d at 366-67 (App. 66a).

The State argued that "[Kulbicki's] pickup truck, that's really the crime scene," where Gina was killed. Detective Ramsey drove the route from the victim's house to the Royal Farm Store and testified that "[i]f Gina was walking, she could have been picked up in any [of] numerous places along the way and people wouldn't have seen anything." The distance between the house and the store was .6 miles; the distance from the store to the Park was 13.8 miles. 207 Md. App. at 427, 53 A.3d at 369-70 (App. 76a, 118a).

Detective Patrick Kamberger "processed" the truck on January 11. The exterior was "filthy," yet inside the cab, the truck appeared very clean, with no surface dust on the dashboard or steering column. The first

thing Kamberger noticed when he opened the cab door was the smell of a household cleaner. The floorboard underneath the driver's floor mat was damp, although the mat itself was dry. 207 Md. App. at 421, 53 A.3d at 366-68 (App. 66a-68a).

A piece of red plastic window molding from directly behind the front passenger seat, about half way up the window, was missing; the rubber strip underneath this spot revealed metallic marks; beneath the strip was what appeared to be an impact area or indentation. Chemical testing of the rubber strip established that the rubber was struck by something made of lead. A firearms expert concluded that the rubber window stripping had been hit by a bullet fragment; if a bullet that had not hit something else had hit the rubber, the bullet would have penetrated it. A piece of red plastic fitting the damaged molding area was found in the truck bed. (*Id.*).

There was no blood visible to the naked eye inside the cab. A preliminary examination of the truck cab using black or ultraviolet light indicated possible blood stains, however, and a forensic serologist was called to assist with further processing. At trial, the serologist testified that stains on the driver's side interior door panel, above the armrest; on the front driver's side floor mat; and on the rear floor mat were determined to be blood. These stains could not be tested further because of the small sample size. Human blood stains were discovered on the rear floor mat; on a seatbelt cover patch; on the underside of the front bench seat cover (but not on the topside of the cover); and on the rear bench seat, where a rider's knees would rest. Four

additional human blood stains revealed an EAP genetic marker consistent with the victim's blood and inconsistent with the defendant's. Most significant, a blood stain on the hard plastic cover for the center seatbelt cover and a blood stain on the rear floor mat revealed three markers that were consistent with the victim's blood type and inconsistent with Kulbicki's. Three additional markers from these same stains were consistent with both Gina's and Kulbicki's blood. (*Id.*).

The denim work jacket seized from Kulbicki's hall closet had what appeared to be clearly visible blood stains on the left sleeve. Detective Capel testified that when Kulbicki saw the search inventory, he asked, "The jacket that you're taking, is that my jean work jacket?" Kulbicki did not ask about any of the other items seized. (*Id.*). The DNA profile obtained from the blood on the jacket matched the DNA profile developed from Gina Neuslein's blood. The probability of a random match in the Caucasian population was 1 in 7 million. There was also a positive indication for blood on the surface of the holster seized from Kulbicki, but no further testing was possible. (*Id.*).

When police lifted the rear bench seat of Kulbicki's truck, they found a small fragment. Analysis established that its major components were calcium and phosphorous, which are the major components of bone. The fragment also contained small amounts of lead. In addition, police discovered what appeared to be three small bone chips (as well as fragments of red plastic and lead) when they vacuumed the cab. Karen Quandt, an expert in DNA profiling, testified that Cellmark Laboratory performed RFLP DNA testing on

the bone fragment and PCR DNA testing on the smaller bone chips. Four of the seven band patterns revealed by the RFLP testing matched those of Gina Neuslein, but because other bands could not be visualized due to sample degradation, Quandt could say only that Gina could not be excluded as the source of the bone fragment. PCR testing, which is less discriminating than RFLP analysis but can be performed on smaller or more degraded samples, likewise indicated that Gina could not be excluded as the source of the three bone chips. The frequency of the PCR type found in the chips was 1 in 640 among Caucasians. 207 Md. App. at 423-25, 53 A.3d at 367-68 (App. 69a-71a, 125a).

Dr. Douglas Owsley, a forensic anthropologist and curator at the Smithsonian Museum of Natural History, examined the larger bone fragment using sophisticated imaging techniques and determined that it was from the outer layer of a human skull. The edges of the fragment indicated that "a tremendous amount of traumatic force" had caused the evulsion of the fragment at or around the time of death. The presence of carbon soot and lead deposits, which had penetrated into the skull, was consistent with a contact gunshot wound. Testing of the smaller bone chips likewise revealed metallic particles embedded in the bone and soot deposits, as well as evulsion fracturing. 207 Md. App. at 423-24, 53 A.3d at 368 (App. 70a, 125a-126a).

Tests by Federal Bureau of Investigation (FBI) Agent Ernest Peele, an expert in Comparative Bullet Lead Analysis (CBLA), demonstrated that the bullet fragment discovered under the rear seat in Kulbicki's

truck was "analytically indistinguishable" from a bullet fragment removed from the victim's brain during autopsy. The composition of one of the bullets found in the gun seized from Kulbicki's house was measurably different from the fragments from the victim and truck, but was close enough to their composition to indicate "some association, such as being made by the same manufacturer on or about the same time. " Joseph Kopera, a firearms expert, testified that the fragments from the truck and the victim had been fired from a gun that was .38 caliber or larger. 207 Md. App. at 424-26, 53 A.3d at 368-69 (App. 71a-74a, 122a-123a).

Two defense witnesses testified that Kulbicki was driving his truck on Saturday afternoon, January 9. Kulbicki then admitted as much when he took the stand on his own behalf. He testified that he was doing errands all afternoon and presented alibi witnesses. One of those witnesses, Joseph Lapaglia, who operated a dry cleaning business, had known Kulbicki since Kulbicki was a schoolchild; Kulbicki's wife worked next door to the cleaners. Another witness, David Mosley, worked with Kulbicki on contracting projects. Kulbicki was a long-time customer at the hardware store of alibi witness Michael Dimenna. All of the alibi witnesses agreed that they were estimating the time they saw Kulbicki. Hasson Stewart, who claimed that he saw someone who was not Kulbicki in a black truck at Gunpowder Park, agreed that he could have seen the truck in March or April. Kulbicki denied killing the victim. 207 Md. App. at 427-28, 53 A.3d at 370 (App. 75a-76a, 126a-128a).

Post-conviction proceedings

While his petition for a writ of certiorari was pending following the affirmance of his convictions on direct appeal, Kulbicki initiated post conviction proceedings by a petition filed in the circuit court on February 24, 1997. Kulbicki amended and supplemented his petition on six occasions through March 21, 2007. Kulbicki's petition was the subject of a five-day hearing in April, 2007. (*See* App. 116a-117a).

In assessing Kulbicki's challenge to his criminal conviction pursuant to the Maryland Post Conviction Procedure Act, the post conviction court recognized that the State's trial evidence against Kulbicki "can be classified into three categories: (1) evidence concerning Kulbicki's relationship with the victim and motive; (2) crime scene evidence and investigation, and; (3) scientific evidence used to link Kulbicki to the crime scene." (App. 117a). The post conviction court concluded, Ms. Clay "did not waiver in her identification" at Kulbicki's post conviction hearing. (App. 134a-135a). The post conviction court also recognized that Kulbicki had presented alibi evidence to corroborate his testimony denying that he committed the murder, as well as expert testimony, on his own behalf. (App. 126a-128a). The post conviction court confirmed that it had "read the transcript of the trial proceedings," (App. 116a), and thoroughly summarized the trial evidence in the opinion supporting its ruling. (App. 117a-129a).

The post conviction court recognized that Kulbicki raised "numerous claims in support of his petition for

post conviction relief," comprising "four broad categories: (1) knowing use of perjured testimony; (2) use of unreliable or unsupported scientific evidence; (3) ineffective assistance of counsel; and (4) failure to disclose exculpatory evidence." (App. 141a). Specifically, Kulbicki sought relief in connection with the admission at trial of comparative bullet lead analysis (CBLA) evidence, the testimony of Joseph Kopera, the testimony of Barbara Clay, and serology and DNA analysis evidence. (App. 129a-130a). Kulbicki's petition for post conviction relief was denied in an Opinion and Judgment Order filed on January 2, 2008. (App. 115a -167a).

The Court of Special Appeals granted Kulbicki's Application for Leave to Appeal and affirmed the denial of post conviction relief in a reported opinion filed on September 26, 2012, *Kulbicki v. State*, 207 Md. App. 412, 53 A.3d 361 (2012). (App.59a-114a). The Court of Appeals granted Kulbicki's petition for certiorari review as well as the State's cross-petition. *Kulbicki v. State*, 430 Md. 344, 61 A.3d 18 (2013).

In an opinion filed on August 27, 2014, the Court of Appeals of Maryland, by a 4 to 3 vote, reversed the judgment of the Court of Special Appeals and granted a new trial. (App. 1a-57a). The Court of Appeals denied Petitioner's motion for reconsideration of that ruling on October 21, 2014. (App. 58a).

The Court of Appeals reversed Kulbicki's conviction on the basis of its finding of ineffective assistance by his trial counsel for failing to challenge the State's CBLA evidence at trial. (App. 9a-10a). The court

granted relief notwithstanding the fact that "Kulbicki did not argue that his attorneys were ineffective for failing to challenge the State's CBLA evidence before the Court of Special Appeals and the intermediate appellate court did not address the issue." (App. 9a).

The Court of Appeals recounted that Kulbicki's defense counsel cross-examined Agent Peele, the State's CBLA expert witness, "regarding the analysis that [the witness] performed in the case, which had been documented in a report provided to [the defense attorneys] pre-trial." (App. 15a-16a). The majority opinion concluded that Kulbicki's attorneys' failure to appropriately investigate a 1991 report prepared by Agent Peele and others, which the majority denominated "the 1991 Peele Report," (*see* App. 21a), and to challenge the State's scientific evidence on the basis of that report on cross-examination at trial fell short of prevailing professional norms. (App. 28a-29a). The majority found that Kulbicki was prejudiced as a result. (App. 30a-33a). Based on its findings, the Court of Appeals majority held that both prongs of the test of *Strickland v. Washington*, 466 U.S. 668 (1984), were satisfied and, on this basis, vacated Kulbicki's conviction and awarded a new trial. (App. 33a-34a).

The dissenting opinion described the case as "troubling" for many reasons. (App.36a). The dissent observed that the majority opinion reverses on "a ground not briefed by either party in this appeal and not among the questions on which we granted the writ of certiorari in this case." (App. 36a-37a). The dissent stated that, although the "Majority opinion briefly and accurately recites the principles that govern

application of [*Strickland*'s] two prongs," the majority does not apply the test set forth in *Strickland v. Washington*. (App. 38a).

The dissent stated that, contrary to the principles outlined in *Strickland*, "the Majority opinion uses information developed long after Mr. Kulbicki's 1995 trial, and not available until years later, to find trial counsel's performance deficient in hindsight," (App. 38a), noting that "[a]t the time of Mr. Kulbicki's trial, in 1995, CBLA had been used in criminal trials for nearly 30 years without serious challenge." (App. 39a). The dissent also stated that "contrary to *Strickland*, the Majority opinion makes no effort to assess the alleged deficiency in light of the other evidence against Mr. Kulbicki that was unaffected by the alleged deficiency," (*id.*), and "downplays" that defense counsel actually cross-examined Agent Peele "at some length and in detail concerning the CBLA analysis" at trial and "was able to point out that the inferences drawn from composition analysis were not as rigorous as the composition analysis itself." (App. 47a). The dissent stated that, "in the end, Agent Peele's testimony was not inconsistent with the results reported by in the FBI study." (*Id.*).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision in this case is fundamentally inconsistent with the core principles of *Strickland v. Washington*, 466 U.S. 668 (1984). Although the majority opinion quoted this Court's admonition in *Strickland*, 466 U.S. at 688-89, that counsel's actions be assessed as of the time of counsel's

conduct, (*see* App. 11-12a), the majority did not adhere to that *Strickland* criterion regarding review of an ineffectiveness claim. Ironically, in faulting trial counsel for failing to have uncovered a 1991 report that "presaged" flaws in CBLA evidence, the majority relied upon its own research, in 2014, locating the report by way of an internet search, (App. 17a n.12). The majority's rear-view assessment of the actions of trial counsel's performance was particularly egregious because, as the dissenting opinion observed, it employed a methodology unavailable at the time of Kulbicki's trial. (App. 43a-44a & n.12).

The Court of Appeals' decision to raise, *sua sponte*, an ineffective assistance of counsel issue on the basis of changes in the science and law of CBLA, coupled with the majority's use of technology unavailable at the time of trial to support its ruling, requires certiorari review by this Court. Moreover, this case provides the Court with the opportunity to clarify the *Strickland* standards in the constantly-evolving area of scientific evidence and to provide much-needed guidance to the lower courts.

I. The appellate court's reliance on scientific advancements and legal changes unavailable to trial counsel is inconsistent with settled Sixth Amendment law.

In *Strickland v. Washington*, 466 U.S. 668, this Court set forth "the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel." *Id.* at 684. This

Court stated in *Strickland:* "The Sixth Amendment recognizes the right to assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id.* at 685. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688. In addition to requiring that assessment of counsel's performance "must be highly deferential," according counsel wide latitude in making tactical decisions, the Court also explicated:

> A fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id. at 689. The reasonableness of counsel's conduct, perforce, must be "viewed as of the time of counsel's conduct" in the particular case in question. *Id.* at 690.

There is no dispute that Kulbicki's counsel had the skill and competency to meet the state's case against their client, and that counsel were aware in advance of trial of the issues that would been mounted by the prosecution's case. Indeed, with respect to CBLA evidence, Kulbicki's attorneys extensively cross-examined the state's expert regarding the witness's assessment of the significance of the bullet lead analysis conducted in the case. (*See* App. 15a-16a, 47a-48a).

By the Court of Appeals' unilateral assessment, however, counsel's actions did not adequately anticipate the coming changes to CBLA. As a result, upon its wholly independent review, the Court of Appeals' majority concluded that Kulbicki must be granted a new trial on grounds of ineffective assistance. *Strickland* refutes the Court of Appeals' ruling.

The majority's generation of an ineffective assistance of counsel issue wholly disregards the assumption in *Strickland* that ineffective assistance of counsel claims properly are raised by a criminal defendant seeking reversal of the conviction on that basis, *id.* at 690 ("A convicted defendant making a claim of ineffective assistance must identify the acts or omission of counsel that are alleged not to have been the result of reasonable professional judgment."), and the *Strickland* requirement "that the defendant affirmatively prove prejudice," *id.* at 693. The majority opinion's touting of the *Strickland* criteria, without actual application of the guidelines, thus, warrants certiorari review of that court's reversal of Kulbicki"s 1995 murder conviction.

Even if Kulbicki's appeal had raised a claim of ineffective assistance of his counsel in connection with the CBLA evidence at his trial, contrary to the scope of the principles outlined in *Strickland*, the majority opinion's assessment of the ineffective assistance issue relied upon scientific information and technology developed long after Kulbicki's 1995 trial and not available until years later.

Kulbicki's counsel's cross-examination and challenge of the state's CBLA expert, Agent Peele, was not only demonstrably skilled and effective, but was eminently appropriate given that CBLA, as recognized by the dissent, "had been used in criminal trials for nearly 30 years without serious challenge." (*See* App. 39a).

The facts of Kulbicki's case disprove the majority opinion's finding that counsel's conduct at Kulbicki's 1995 trial was deficient or wanting. The Sixth Amendment principles advanced in *Strickland* were disregarded and thwarted, not served, by the Court of Appeals' reversal in this case. Certiorari review, accordingly, is fully warranted.

II. The Court of Appeals' post-hoc consideration of advances in science and technology presents important issues not previously addressed in this Court's Sixth Amendment right to counsel jurisprudence.

Certiorari review is supported by the fact that reassessment of constitutional provisions and principles becomes necessary in light of technological advancement or change in law. *See, e.g., Riley v. California*, ___ U.S. ___, 134 S.Ct. 2473 (2014) (review of post-digital era search of cell phone data under Fourth Amendment); *Jones v. United States*,565 U.S. ___, 132 S.Ct. 945 (2012) (addressing Fourth Amendment in context of search pursuant to Global-Positioning-System (GPS) tracking device); *City of Ontario, California v. Quon*, 560 U.S. 746, 130 S.Ct. 2619 (2010) (review under Fourth Amendment of

search of text messages); *Dist. Atty's Office for Third Jud. Dist., et al., v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308 (2009) (assessment of constitutional due process right to access to DNA testing post-trial); *see also Chaidez v. United States*, ___ U.S. ___, 133 S. Ct. 1103 (2013) (review of required advice by counsel on risk of deportation under Sixth Amendment in light of construction of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in *Padilla v. Kentucky*, 559 U.S. 356 (2010)). It does not follow, however, that every attorney who did not foresee such changes offered ineffective assistance. Indeed, this Court in *Strickland* said just the opposite.

Nevertheless, in its review of the lower courts' denial of relief in Kulbicki's post conviction proceeding, the Court of Appeals initiated an issue of ineffective assistance of trial counsel in order to address the changes in science and law it perceived with respect to CBLA evidence admitted at Kulbicki's 1995 trial. Based upon changes occurring years after Kulbicki's trial, specifically advancements in the science regarding CBLA evidence and its own decision in *Clemons v. State*, 392 Md. 339, 896 A.2d 1059 (2006), holding that CBLA evidence did not satisfy the Maryland test under *Frye v. United State*, 293 F. 1013 (D.C.Cir. 1923), and *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978) (the *Frye-Reed* test), the Court of Appeals majority concluded that trial counsel were ineffective in failing to adequately cross-examine the state's CBLA expert to explore the "faulty assumption" of CBLA "that bullets produced from different sources of lead would have a unique chemical composition." (App. 21a).

The Court of Appeals' awareness of technological changes in the conclusions derived from CBLA, and its own alteration of Maryland law in *Clemons* based upon those advancements, constituted a siren's call that impelled the court to initiate a case of its own making, divorced from the issues presented to the court by the parties, and to vacate a settled conviction and grant a new trial based upon its assessment of its own ineffective assistance of counsel issue. In so doing, the Court of Appeals majority violated the scope of the right to counsel provided by the Sixth Amendment, constitutional due process, and the law applicable in assessing assistance by counsel enunciated by this Court in *Strickland*. The Court of Appeals' departure evidences an issue left unresolved in *Strickland*.

Since promulgation of the principles for evaluating ineffective assistance claims enunciated in *Strickland*, this Court has not had occasion to address specifically the requirement that actions of counsel asserted to be deficient be assessed as of the time of that conduct. The ruling reversing the murder conviction in Kulbicki's case on the basis of ineffective assistance of counsel requires that this Court now do so.

The Court of Appeals majority reversed Kulbicki's conviction on the basis of a 1991 report, with limited circulation and prepared by panel of six analysts including Agent Peele, which the majority uncovered by means of a web-based search. The dissent questioned whether the 1991 report was even available outside the FBI at the time of Kulbicki's trial. (App. 43a). Not only were the subsequent scientific advances upon which the majority opinion concluded that trial

counsel's actions were ineffective not available to trial counsel, but the internet means for securing the material that the majority maintained "presaged" flaws in CBLA also were not available at the time counsel were preparing for trial.

In formulating in *Strickland* the guidelines for assessment of actual ineffective assistance of counsel claims, this Court took cognizance of the "the profound importance of finality in criminal prosecutions," 466 U.S. at 693, noting that in federal proceedings "the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment," *id.* at 697. This Court characterized an ineffectiveness claim as "an attack on the fundamental fairness of the proceeding whose result is challenged." *Id.* at 697.

Accordingly, this Court justifiably was wary of "[t]he availability of intrusive post-trial inquiry into attorney performance" and of encouraging "the proliferation of ineffectiveness challenges." *Strickland*, 466 U.S. at 690. As this Court reasoned:

> Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intrusive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Id.

The reasoning of the majority opinion in Kulbicki's case makes clear that this Court's concern in *Strickland* regarding "intrusive post-trial inquiry" and an increase or proliferation of post-trial challenges has been exacerbated by today's fast pace of scientific development and technological advances. *Cf. Riley*, 134 S.Ct. at 2484 (addressing changes due to "technology nearly inconceivable just a few decades ago"); *Quon*, 560 U.S. at 759 (recognizing that "[r]apid changes in the dynamics of communication and information transmission are evidence not just in the technology itself but in what society accepts as proper behavior"). The concerns of this Court in *Strickland* and unresolved questions regarding scientific and technological advancements warrant issuance of a writ of certiorari in this case.

III. The Court of Appeals' decision is in conflict with numerous decisions of the federal circuit courts of appeals and state courts of last resort.

The Court of Appeals' holding squarely conflicts with the weight of authority among the federal circuit courts of appeals and state courts regarding the assessment of attorney performance under *Strickland*. As the dissenting opinion pointed out, decisions of reviewing courts in prior cases have not found the failure to discover flaws in CBLA evidence at trial in the 1990s to constitute ineffective assistance by counsel. (App. 55a-56a, n. 16 (citing *United States v. Davis*, 406 F.3d 505, 508–10 (8th Cir.2005) (not

ineffective assistance of counsel at 1995 trial when research used to challenge CBLA evidence in post-conviction proceeding did not begin until three years after trial and some limitations of that evidence ultimately exposed in research were raised by defense at trial); *Smith v. Department of Corrections*, 572 F.3d 1327, 1350 (11th Cir.2009) (defense counsel not required to anticipate future developments concerning CBLA evidence at 1990 trial); *Libby v. McDaniel*, 2011 WL 1301537, at *8–9 (D.Nev. 2011) (same; 1990 trial); *Robertson v. State*, 2009 WL 277073 (Tenn.Crim.App.2009) (same; 1998 trial); *Wyatt v. State*, 71 So.3d 86, 103 (Fla.2011) (defense counsel did not provide ineffective assistance of counsel with respect to CBLA evidence at 1991 trial when comprehensive research concerning flaws in CBLA evidence did not exist until well after that trial); *Wyatt v. State*, 78 So.3d 512, 527 (Fla.2011) (same result with respect to same defendant, but different trial); *see also United States v. Higgs*, 663 F.3d 726, 739 (4th Cir.2011) (defense trial counsel was not ineffective at 2000 trial in failing to ferret out internal FBI studies of CBLA that pre-dated published studies, particularly when counsel obtained important concessions on cross-examination)).

Indeed, the majority opinion itself recognized that its decision was inconsistent with the conclusion reached by many other jurisdictions. (App. 29a-30a, n. 14). On the basis of inconsistent rulings by lower courts, and the highly unorthodox nature of the Court of Appeals' divergence from *Strickland*, review and guidance by this Court is required. The need for review in this area is particularly compelling given the

increasingly important role science and technology play in criminal trials. The Court of Appeals' distortion of the *Strickland* standard erodes one of the bedrock principles of this Court's Sixth Amendment jurisprudence, and issuance of a writ of certiorari in Kulbicki's case is necessary and justified.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

BRIAN S. KLEINBORD*
MARY ANN RAPP INCE
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6435
bkleinbord@oag.state.md.us

Counsel for Petitioner

**Counsel of Record*
January 16, 2015

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 13

September Term, 2013

JAMES KULBICKI

v.

STATE OF MARYLAND

Harrell
Battaglia
Greene
Adkins
McDonald
Eldrige, John C. (Retired, Specially Assigned)
Rodowsky, Lawrence F. (Retired, Specially Assigned),

JJ.

Opinion by Battaglia, J.
Harrell, McDonald, and Rodowsky, JJ., dissent

Filed: August 27, 2014

The Petitioner, James Kulbicki, was convicted in 1995 of first-degree murder and the use of a firearm in the commission of a felony in the Circuit Court for Baltimore County,[1] based, in part, on the testimony of Agent Ernest Peele of the Federal Bureau of Investigation. Agent Peele testified that a bullet fragment found in Kulbicki's truck and a bullet found inside the victim were "what you'd expect if you were examining two pieces of the same bullet," and moreover, that a bullet recovered from a handgun found in Kulbicki's home "could have been in the same box" as the bullet taken from the victim, relying on Comparative Bullet Lead Analysis ("CBLA").[2] We

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[1] Kulbicki, originally, was convicted in 1993, but that conviction was reversed by the Court of Special Appeals. *Kulbicki v. State*, 102 Md.App. 376, 649 A.2d 1173 (1994). After Kulbicki was re-tried and convicted in 1995, the Court of Special Appeals affirmed the conviction in an unreported decision, and we denied his petition for a writ of certiorari. *Kulbicki v. State*, 345 Md. 236, 691 A.2d 1312 (1997).

[2] In *Clemons v. State*, 392 Md. 339, 896 A.2d 1059 (2006), we had occasion to explain the CBLA process as utilized by the FBI:

> After obtaining the elemental composition numbers, the samples are categorized "according to similarity of compositional presence." "Compositions similar to a crime scene bullet(s) are put

(continued...)

(...continued)

> in one group and considered 'analytically indistinguishable'; compositions considered dissimilar are placed in different groups and considered 'analytically distinguishable.'" From that data, the expert witness will draw a conclusion as to the probative significance of "finding 'analytically indistinguishable' (similar) compositions in both crime scene and 'known' bullet samples." The entire process is premised upon three assumptions: the fragment being analyzed is representative of "the composition of the source from which it originated"; the source from which the sample is derived is compositionally homogeneous; and "no two molten sources are ever produced with the same composition."

Clemons v. State, 392 Md. 339, 367–68, 896 A.2d 1059, 1076 (2006) (internal citations omitted). As we explained in *Clemons*, however, by 2006, the latter two assumptions had come under attack by the scientific community:

> Recently the assumptions regarding that uniformity or homogeneity of the molten source and the uniqueness of each molten source that provide the foundation for

(continued...)

determined, however, in 2006 that under the *Frye–Reed* standard,[3] CBLA evidence was not generally accepted by the scientific community. *Clemons v. State*, 392 Md. 339, 896 A.2d 1059 (2006). One of the major flaws of CBLA, we observed in *Clemons*, was that it had been predicated on the assumption that each source of lead from which bullets were derived was unique, allowing bullets that come from different batches to be distinguished from one another, an assumption that we determined to be questionable; "The assumption that each molten lead source is unique is also being questioned by analytical chemists and metallurgists." *Id.* at 369, 896 A.2d at 1077.

Kulbicki was convicted before *Clemons* was decided.

(...continued)

> CBLA have come under attack by the relevant scientific community of analytical chemists and metallurgists.

Id. at 368, 896 A.2d at 1076.

[3] The *Frye–Reed* test "is the test in Maryland for determining whether expert testimony is admissible. The name is derived from two cases, *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), where this standard of general acceptance in the relevant scientific community was first articulated, and *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978), where we adopted the *Frye* standard." *Blackwell v. Wyeth*, 408 Md. 575, 577 n. 1, 971 A.2d 235, 237 n. 1 (2009).

Nevertheless, within a few years of his conviction, he sought post-conviction relief under the Uniform Postconviction Procedure Act,[4] arguing not only that the admission of "unreliable" CBLA evidence was a due process violation, but that his attorneys rendered ineffective assistance of counsel for failing to adequately cross-examine Agent Peele.[5] The Circuit

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[4] In 1997, when Kulbicki initiated these proceedings, the Uniform Postconviction Procedure Act was codified at Sections 645A *et seq.* of Article 27 the Maryland Code. It was re-codified in 2001 as part of the new Criminal Procedure Article. Chapter 10, Laws of Maryland 2001. The Act currently appears at Sections 7–101 *et seq.* of the Criminal Procedure Article, Maryland Code (2001, 2008 Repl.Vol., 2013 Supp.).

[5] Kulbicki filed his initial Petition for Post–Conviction Relief in 1997 without the assistance of counsel. At his request, the hearing on his initial post-conviction claim was postponed until Kulbicki filed amended petitions in 2004 and 2005. After a number of additional requests for postponements by Kulbicki, in 2006, with the assistance of counsel, he filed another amended petition that consolidated various claims. The 2006 Petition alleged, with respect to Kulbicki's claim of ineffective assistance of counsel that, "[a]lthough much of the evidence that has led to the demise of CBLA is newly discovered, the trial attorneys failed to make use of evidence that was in existence at the time." Specifically, the Petition asserted the following:

(continued...)

(...continued)

1. The attorneys failed to request the underlying data forming the basis of the FBI's conclusions regarding CBLA.
2. The attorneys failed to obtain independent statistical analysis that would have shown the FBI examiner was ignoring exculpatory data.
3. The attorneys failed to adequately cross-examine the CBLA expert, for example, the total number of bullets manufactured that would be analytically indistinguishable was not explored.
4. The attorneys failed to request a *Frye–Reed* hearing that would have led to the suppression of the CBLA evidence.

* * *

6. Defense counsel failed to object on the ground that the FBI examiner's opinions and conclusions were outside those expressed in his report and therefore the State had not given notice as required by discovery rules.

After we decided *Clemons* in 2006, Kulbicki filed a

(continued...)

Court Judge denied relief, opining with respect to Kulbicki's ineffective assistance of counsel claim that "questions concerning the reliability of that science didn't even surface until long after Mr. Kulbicki's trial", and therefore, Kulbicki's attorneys could not be faulted for not challenging the CBLA evidence:

> With CBLA, ineffective assistance is not a legitimate argument. The questions concerning the reliability of that science didn't even surface until long after Mr. Kulbicki's trial. The reputation for reliability of the FBI laboratories, which performed the analysis in this case, was well known and there is no evidence in this record to demonstrate they could have been effectively challenged at trial. And the undisputed evidence was that no private laboratories routinely performed this service at that time. Thus counsel was faced with the unquestioned expert in this field, which was generally accepted as competent evidence at the time of trial. That expert was appropriately cross-examined. Counsel cannot reasonably be faulted concerning their approach to CBLA evidence at the time of trial.

(...continued)
supplement to his post-conviction Petition, using our decision in *Clemons* to bolster his arguments that the admission of CBLA evidence entitled him to a new trial.

The Court of Special Appeals affirmed in a reported opinion, without addressing Kulbicki's ineffective assistance of counsel claim as it related to Kulbicki's attorneys' exploration of CBLA evidence. *Kulbicki v. State*, 207 Md.App. 412, 450–53, 53 A.3d 361, 383–85 (2012). We granted certiorari to consider the following questions, which we have renumbered:[6]

1. Does the failure of defense counsel to investigate or challenge the State's scientific evidence and failure to object to improper closing arguments suggesting guilt constitute ineffective assistance of counsel?
2. Does a conviction obtained through the use of scientific evidence that is later demonstrated to be unreliable, misleading, and inadmissible violate a defendant's guarantee of due process?
3. Does the use of perjured expert testimony by a State expert violate a defendant's due process rights when the perjured testimony involves the expert's qualifications and background?

Kulbicki v. State, 430 Md. 344, 61 A.3d 18 (2013). We also granted the State's conditional cross-petition to address the following question:

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[6] Because we will conclude that Kulbicki is entitled to a new trial on the basis of ineffective assistance of counsel, we will not reach his remaining two questions, or the State's conditional cross-petition.

> Did the Court of Special Appeals err in stating that the State is chargeable with the "knowing use of perjured testimony" where the falsity is unknown at the time of the testimony?

Id.

Kulbicki did not argue that his attorneys were ineffective for failing to challenge the State's CBLA evidence before the Court of Special Appeals and the intermediate appellate court did not address the issue. Ineffective assistance of counsel with respect to the CBLA evidence, moreover, was not addressed in Kulbicki's brief before us; during oral argument, however, after the State argued that the admission of CBLA evidence was not a due process violation because Kulbicki's attorneys should have been able to test the flawed assumptions upon which CBLA was based at trial, questions were raised by the Court regarding ineffectiveness of counsel.[7]

We shall hold that Kulbicki's attorneys rendered ineffective assistance when they failed to investigate

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[7] While, ordinarily, we will not reach an issue that has not been argued by the parties, we retain discretion to do so. See Rule 8–131. In *Braxton v. State*, 123 Md.App. 599, 633, 720 A.2d 27, 43 (1998), our brethren on the Court of Special Appeals opined that Rule 8–131 confers discretion to consider an issue "not raised by the parties on appeal," including in instances when the issue was "discussed at oral argument."

and cross-examine the State's CBLA expert, Agent Ernest Peele, based upon a report he co-authored in 1991, which presaged the flaws in CBLA evidence, and therefore, will reverse Kulbicki's conviction and order a new trial.[8]

The present case began when, during the course of a homicide investigation by the Baltimore County Police Department, a bullet was recovered from the victim's body. Thereafter, two bullet fragments were recovered from Kulbicki's vehicle in addition to six bullets taken from a handgun found in Kulbicki's home. The bullets were then analyzed by the FBI laboratory and the results were interpreted by Agent Ernest Peele, who testified for the State at Kulbicki's trial.

Agent Peele testified that the CBLA process

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[8] At Kulbicki's post-conviction hearing, both of his attorneys testified that they had no recollection as to their preparation with respect to the State's CBLA evidence. One lawyer testified that he did not recall whether he had "investigated or spoke with anyone regarding the field of CBLA and its validity"; or whether he "review[ed] any literature or articles on CBLA" Kulbicki's other attorney similarly testified that she did not recall whether they had considered calling "an expert on the area of CBLA"; whether she had spoken with anybody "about the reliability of such evidence"; or whether she had met "with Peele personally prior to trial."

permitted him to analyze the chemical composition[9] of the lead contained within bullets and, using the chemical composition numbers, determine if the composition in the bullets were the same or substantially similar to each other. Based on the compositional similarities of the bullets he tested, Agent Peele drew a number of conclusions that purported to connect Kulbicki to the homicide.

Agent Peele testified, first, that a bullet fragment taken from the victim's autopsy, designated "Q–1", and one of the bullet fragments taken from Kulbicki's truck, "Q–2", were "what you'd expect if you were examining two pieces of the same bullet":

> [STATE'S ATTORNEY]: [W]hat conclusion did you draw, if any, when comparing Q–1 and Q–2, those two bullet fragments?
> [AGENT PEELE]: Well, Q–1 and Q–2 have the same amounts of each and every element that we detected. To the extent that that's what you'd expect if you were examining two pieces of the same bullet, they are that close, two pieces of the same source.
> [STATE'S ATTORNEY]: Uhm, I think in looking at your report you used the term analytically indistinguishable.

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[9] Agent Peele testified that he would look to the "quantity" of varying elements contained within the lead. Specifically, he asserted, the bullets were analyzed for six elements: copper, antimony, arsenic, bismuth, silver, and tin.

[AGENT PEELE]: Yes, sir. That's a term basically meaning we can see each and every element. We can see the same quantity of each and every element in two different pieces such that if we were to drop those pieces, all of the samples from each one of, each of Q–1 and Q–2 on the floor and, we would not be able to put them back into their respective sample they are that close together in composition.

Agent Peele then compared Q–6, one of the bullets recovered from the handgun, and the samples taken from the victim and Kulbicki's truck, stating that, compositionally, they were "extremely" and "unusually close" so that "there's some association" between the bullets:

[STATE'S ATTORNEY]: And what conclusions, if any, did you draw in comparing the compositional analysis or the composition of Q–6 in comparison to Q–1 and Q–2, which are the bullet fragments?

[AGENT PEELE]: Well, Q–6 is measurably different from Q–1 and Q–2 such that in the analytical process you can physically see that not all the elements have exactly the same composition. However, Q–6 is extremely close to Q1 and Q–2. It is unusually close in that that's not what you'd expect, unless there's some association between the two groups.

In other words, Q–1 and Q–6, the amount of copper is slightly different and the amount of arsenic is slightly different. All the other elements are the same and, certainly, those are

types of things that you wouldn't expect to occur unless there's some association, such as being made by the same manufacturer on or about the same time, that kind of association. They are close enough that I have seen those differences, even in the same larger piece but, certainly, they are also different enough that I can't really include uhm [sic] as well as I would Q–1 and 2 to each other.

During re-direct, Agent Peele explained that, although it was not conclusive, the closeness in composition of the three bullets—the autopsy fragment, the truck fragment, and one of the bullets found in the handgun—was consistent with having originated from the same box of bullets, because in each box, he asserted, you would expect to find a number of distinct chemical compositions:

[STATE'S ATTORNEY]: [Y]our opinion was that as to Q–6, it's that one bullet, when compared to fragments, I think your term was unusually close, extremely close in composition?
[AGENT PEELE]: Yes, sir.

* * *

[STATE'S ATTORNEY]: [W]ould you expect to see differences in the composition of bullets from the same box, or are all bullets from the same box exactly the same?
[AGENT PEELE]: Certainly not.
[STATE'S ATTORNEY]: Okay. Just explain that. I think you already answered. Just explain about the bullets in a box, how they can be different and you would expect them to be

different.

[AGENT PEELE]: Yes, sir. Even in one box of ammunition, a box of 50 rounds of ammunition, the bullets in that box don't all have the same composition. Normally even in one box you'll have groups. For instance, 25 of the bullets may have the same composition such that it would have the same, that group would have the same amounts of each and every element measured. Another group would have a different composition—by different, something that was measurably different in one or more elements. Maybe all of the elements could be slightly different which would constitute, then, a second group.

This group, again, would have a number of bullets in it or it could have a number of bullets in it all the way from one up to—if the box only had two compositions and the first one had 25, this one would then have 25, as well. But, normally, there are several compositions in a box. Around five. Especially in Remington ammo, there are fi-, normally five compositions even in one box, and those compositions differ from each other by varying amounts. The differences that I see, even in one box, certainly are no more than the differences that I see right here. **So all these bullets at one time could have been in the same box.** I'm not saying they were because they are different. And those differences may have been in the box; they may not have been but, certainly, these differences are not too great that all of them could not have been in the same box at one time—

(emphasis added).

Kulbicki's defense counsel cross-examined Agent Peele regarding the analysis that he performed in the case, which had been documented in a report provided to them pretrial. Using the report, counsel questioned Agent Peele, primarily, regarding his conclusions related to the similarities in chemical composition amongst the varying samples. Based upon a number of questions posed by defense counsel, Agent Peele testified that, in his report, he had "grouped" the bullets based on the similarity of their composition, and placed four of the bullets taken from Kulbicki's handgun, Q–5 through Q–8, in a separate "grouping" than the bullet found in the victim, indicating that there were differences in their compositions:

> [COUNSEL FOR KULBICKI]: Okay. Now, you've testified on the second, on Page Two of your report, you have two groups listed within Group I and Group II, correct.
> [AGENT PEELE]: Yes, sir.
> [COUNSEL FOR KULBICKI]: And Group I you list that Q–1 and Q–2 essentially have the same compositional components.
> [AGENT PEELE]: That's correct.
> [COUNSEL FOR KULBICKI]: Okay. You've testified that Q–6 could be similar, but it's measurably different.
> [AGENT PEELE]: Q–6 has very similar composition, has a very similar overall composition with slight differences in two of the elements, yes, sir.

> [COUNSEL FOR KULBICKI]: But you didn't list that in your report under Group I?
> [AGENT PEELE]: No, sir, I did not. I included only those that were exact.
> [COUNSEL FOR KULBICKI]: And as far as specimens Q–5, Q–6, Q–7 and Q–8, you determined that they belonged in neither group?
> [AGENT PEELE]: Correct. They are all, they all have differences from what appears in Groups I and, II.
> **[COUNSEL FOR KULBICKI]: Okay. The differences were so great that they could not be linked to either group, correct?**
> **[AGENT PEELE]: The differences were enough so that they were not put in any group, yes, sir.**

(emphasis added).

During closing argument and rebuttal, the State seized on the CBLA testimony to argue that Kulbicki's truck was the scene of the murder, and moreover, that Kulbicki's handgun was the murder weapon. Specifically, the State argued that the "two bullet fragments, the one from [the victim's] head, the one in the Defendant's truck, are the same.... You can't tell one from the other." Likewise, the State argued to the jury that the bullet found in Kulbicki's handgun was compositionally the same as the bullet found inside of the victim:

> Even more interesting is Agent Peele's examination of the bullets that he found inside that gun. Remember when he was talking

> about that Q–6, the Q–6 bullet and he said, I examined that compositionally. That Q–6 bullet is very nearly identical to the two bullet fragments, the one come coming from [the victim's] head and the one coming from the autopsy. Very close in composition in parts per million. Not exact. He did not say it was exactly identical; he said it was very nearly close when he broke it down into parts per million. **Now, think about this. Out of all the billions of bullets in this world, is this just a coincidence that that bullet ends up in the Defendant's off-duty weapon? Is, is that just a coincidence? I don't think so.**

(emphasis added). During closing argument, on behalf of Kulbicki, however, counsel never seriously challenged the State's arguments regarding the CBLA evidence, aside from asserting that none of the compositional numbers " match up too closely":

> [W]hat we did was, when Agent Peele was testifying and we looked at his notes, you'll see the different calculations. And, no, none of uhm [sic] match up too closely. I'm not an expert on bullets but, as you'll see, there's all different sorts of numbers on there. All different sorts of numbers.

The State's CBLA evidence, therefore, was central to the State's case. Defense counsel sought to undermine Agent Peele's conclusions by questioning the compositional similarities or lack thereof among the various bullet fragments, but failed to explore, in

any way, one of the fundamental assumptions of CBLA, which is that compositional sameness established an association among the bullets that were tested. Is this lapse significant for purposes of a claim for ineffective assistance of counsel?

Claims for ineffective assistance of counsel are evaluated under the United States Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, our analysis is two-fold: we must decide whether counsel rendered constitutionally deficient performance and whether such deficient performance prejudiced the defendant's case. *Id.* at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. In discerning whether performance was deficient, we start with the presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment" and our review of counsel's performance is "highly deferential." *Bowers v. State*, 320 Md. 416, 421, 578 A.2d 734, 736 (1990); *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. Applying this framework, we look to whether counsel's "representation fell below an objective standard of reasonableness." *Harris v. State*, 303 Md. 685, 697, 496 A.2d 1074, 1080 (1985). We assess reasonableness, moreover, at "the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695.

Evaluating the reasonableness of an attorney's conduct "spawns few hard-edged rules", *State v. Borchardt*, 396 Md. 586, 604, 914 A.2d 1126, 1136 (2007), but a number of principles have emerged that

are relevant to the matter before us. In the course of representing a client, an attorney must make decisions on the basis of adequate investigation and preparation. *See Coleman v. State*, 434 Md. 320, 338, 75 A.3d 916, 927 (2013). This obligation extends with equal force to forensic evidence; "[f]ailure to investigate the forensic evidence is not what a competent lawyer would do." *Bowers,* 320 Md. at 434, 578 A.2d at 743. We have also recognized that the failure to conduct an adequate cross-examination may be a basis for finding deficient performance under *Strickland*. *See id.*

The United States Court of Appeals for the Eighth Circuit has specifically recognized that the failure to properly investigate forensic methodology and adequately cross-examine a State's forensic expert may be a basis for deficient performance. In *Driscoll v. Delo*, 71 F.3d 701, 704 (8th Cir.1995), Driscoll was charged with the murder of a corrections officer that occurred during a prison riot. The State argued that the murder had been committed with the use of a homemade knife that Driscoll had constructed while he was incarcerated. *Id.* at 707. At trial, the State presented the testimony of Dr. Su, the Chief Forensic Serologist with the Missouri Highway Patrol Crime Laboratory, whose report indicated that pursuant to a blood-identification test called the "thread" test, the victim's blood-type, type O, was not found on the knife; Dr. Su testified, however, that the lack of the victim's blood could be attributed to the presence of type-A blood from another victim, which, she argued, could have "masked" the presence of the type O blood. *Id.* at 707. Defense counsel never questioned Dr. Su about whether she had performed any other

blood-identification tests on the knife. *Id.* It was discovered during the post-conviction proceedings that Dr. Su had in fact performed another test, the "lattes" test, which, unlike the thread test, prevented masking from occurring. *Id.* at 707–08. The results of the lattes test revealed that there was no type O blood on Driscoll's knife, but the existence of the lattes' result was not brought out in cross-examination, so that the jury was left with the impression that Driscoll's "knife likely had been exposed to both type A and type O blood." *Id.* at 708.

On appeal, the Eighth Circuit considered the issue of "whether defense counsel's performance in failing to investigate and to adequately cross-examine Dr. Su about the serology tests performed on the state's evidence fell below an objectively reasonable standard of representation" and concluded that it had. *Id.* The court opined that Dr. Su's report should have alerted counsel to the "possibility of conclusively detecting both A and O on the same item of evidence", because the report indicated that both types of blood were found on the victim's boots. *Id.* at 709 (emphasis omitted). Given the serious charges that Driscoll faced as well as the significance to the State of proving that the victim's blood appeared on the alleged murder weapon, counsel's failure "to prepare for the introduction of the serology evidence, to subject the state's theories to the rigors of adversarial testing, and to prevent the jury from retiring with an inaccurate impression that the victim's blood might have been present on the defendant's knife" fell "short of reasonableness under the prevailing professional norms." *Id.*

The failure, then, to appropriately investigate the State's forensic evidence and challenge the State's expert on cross-examination regarding a scientific method used to implicate the defendant may be a predicate upon which a claim for ineffective assistance of counsel may prevail. The Circuit Court Judge in the instant case, however, cognizant of the principle that counsels' performance must be assessed at the time of Kulbicki's trial, concluded that, "[w]ith CBLA, ineffective assistance is not a legitimate argument", because, she reasoned, "questions concerning the reliability of that science didn't even surface until long after Mr. Kulbicki's trial." We disagree.

In 1991, four years prior to Kulbicki's trial, Agent Peele and a number of his colleagues published a report which presaged the very flaw that ultimately lead us to conclude in *Clemons* that CBLA evidence was invalid and unreliable—the faulty assumption that bullets produced from different sources of lead would have a unique chemical composition. *See* Ernest R. Peele et al., *Comparison of Bullets Using the Elemental Composition of the Lead Component in Proceedings of the International Symposium on the Forensic Aspects of Trace Evidence* 61 (June 24–28, 1991) (hereinafter "the 1991 Peele Report"). The study focused on the "compositional variability of bullet leads from four major U.S. Manufacturers", with the goal of defining "the variability in element composition within individual bullets, among bullets within boxes of cartridges, among boxes packaged on the same date, among boxes packaged on different dates, and among boxes from the different manufacturers." *Id.* at 57. To that end, Agent Peele and his colleagues analyzed the

elemental composition of cartridges contained within full boxes of four different brands of .38 caliber cartridges—Cascade Cartridge Industries, Federal, Remington, and Winchester. *Id.* at 58.

The 1991 Peele Report observed, with respect to the Federal-brand cartridges, that, of the four boxes of Federal-brand cartridges that were tested, "three boxes contain[ed] two distinct compositional groups." *Id.* at 61. Significantly, the box identified as "box two" had "overlapping compositions" with boxes one and four, but had been packaged *fifteen months earlier*. *Id.* at 61.[10] The authors did not conduct any further research to explain the existence of overlapping compositions, but speculated as to a number of explanations, including that it was a "coincidence"; "because the bullets originated from the same analytically homogenous source of lead"; or "the cartridges were produced from a common lead production source and component storage before cartridge loading":

> There are two possible explanations for the overlapping compositions for bullets packaged on different dates. Overlapping compositions occur either by coincidence or because the bullets originated from the same analytically

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[10] Two boxes, designated boxes one and four, also had overlapping compositions, but that was attributed to the fact that they had "the same production and packaging date." The 1991 Peele Report, at 61.

> homogenous source of lead. From our previous experience and discussion with Federal Cartridge Corporation representatives, a reasonable explanation for multiple boxes containing indistinguishable lead compositions is that the cartridges were produced from a common lead production source and component storage before cartridge loading.

Id. at 61–62.

The failure to fully explore the variance, however, is at odds with the scientific method, as we explained in *Blackwell v. Wyeth*, 408 Md. 575, 583, 971 A.2d 235, 240 (2009):

> Once data is compiled, analysis occurs, from which conclusions are drawn; the hypothesis either remains viable or is disproven:
>
> > Note that a hypothesis or a theory is never proven or confirmed to be true. Testing is capable only of disconfirming. But theories that withstand such attempts at falsification better and longer become accepted, at least until something better comes along. The opposite approach can readily be seen in non-scientific activities of numerous kinds, where investigators engage in a search for evidence that confirms their suspicions. This confirmatory bias is based on the erroneous assumption that a theory is confirmed by the

> accumulation of facts consistent with the theory.... It is the diligent search for inconsistencies, for falsification, that really puts a theory to the test. A theory that can withstand such scrutiny is one that deserves credence.

Id. at 583, 971 A.2d at 240, quoting David L. Faigman, Michael J. Saks, Joseph Sanders & Edward K. Cheng, 1 Modern Scientific Evidence: The Law and Science of Expert Testimony, at 264 (2008). The speculation proffered by the 1991 Peele Report regarding the overlapping compositions is consistent with "confirming suspicions", rather than withstanding attempts at falsification.[11]

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[11] The 1991 Peele Report, additionally, using a hypothetical, asserted that CBLA remained viable:

> As an illustration of forensic application of this approach, let us take an example of one bullet removed from a victim, five cartridges from a revolver, and 44 cartridges from a box associated with the suspect. Each bullet component of all these specimens is analyzed.... The composition of the bullet from the victim is analytically indistinguishable in all five elements determined from two bullets from the gun and twenty from the box. Two more bullets from the gun are compositionally indistinguishable from

(continued...)

The 1991 Peele Report, however, called into question the assumption that no two sources of lead would ever produce bullets with the same chemical composition, as the 1991 Peele Report clearly indicated that two bullets produced fifteen months apart had the same composition. The Report, moreover, was published on June 24, 1991 and was available to Kulbicki's attorney in 1995.[12] When Agent Peele was

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[11](...continued)

> 10 others from the box. The last bullet from the gun is compositionally indistinguishable from seven others from the box. The seven remaining bullets from the box fall into two additional compositional groups. It is our opinion that these results are forensically significant in associating the victim, weapon, and suspect in this example.

Id. at 68. This, too, is inconsistent with the scientific method, as it failed to account for a flawed assumption that would undermine the hypothesis that compositional sameness implied association.

[12] The compilation, in which the 1991 Peele Report appears, *Proceedings of the International Symposium on the Forensic Aspects of Trace Evidence*, was distributed to various public libraries in 1994. According to the *Catalog of U.S. Government Publications*, the compilation was distributed to depository libraries in "Shipping list no.: **94**–0833–M",

(continued...)

cross-examined, the 1991 study authored by him was never exhumed; the potential for having two bullets with the same composition produced at different times was never explored, even though opportunity knocked. During his re-cross examination, Agent Peele, rather, testified that he would not expect a random bullet to match any of the bullets derived from the crime scene or Kulbicki's handgun:

> [KULBICKI'S COUNSEL]: Isn't it true that if I gave you a Reming—, a Remington bullet at this time, the results could be similar to any of those as in Q–1 through Q–9?
> [AGENT PEELE]: I would not expect, if you hand me a Remington bullet right now, **that it would be the same as any one of these, no, sir**.
> [KULBICKI'S COUNSEL]: I didn't say the same. But it could be similar, correct?
> [AGENT PEELE]: Well, it's gonna be similar in that it's going to have more than likely

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[12](...continued)
indicating that it was distributed in 1994. *See Catalog of U.S. Gov't Publications*, U.S. Gov't Printing Office, http://catalog.gpo.gov/ (search "Proceedings of the International Symposium on the Forensic Aspects of Trace Evidence", then follow hyperlink entitled "Proceedings of the International Symposium on the Forensic Aspects of Trace Evidence [microform]: June 24–28, 1991, Forensic Science Research and Training Center, FBI Academy, Quantico, Virginia/") (last visited August 20, 2014) (emphasis added).

> measurable amounts of all these elements, ... except tin; it probably will not have that. So in that respect, yes, it's going to be similar.

(emphasis added).

Had Kulbicki's attorneys investigated and discovered the 1991 Peele Report, they would have had a potent challenge to Agent Peele's conclusion that the bullet fragment taken from the victim's autopsy and the fragment found in Kulbicki's truck was "what you'd expect if you were examining two pieces of the same bullet ... two pieces of the same source", as well as the conclusion that a bullet taken from Kulbicki's handgun and the bullet taken from the autopsy were similar enough, so that "there's some association between the two groups."[13] Kulbicki's counsel, then, would have

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[13] William Tobin, a former FBI examiner, testified at Kulbicki's post-conviction hearing, challenging the conclusions Agent Peele offered at Kulbicki's 1995 trial. With respect to Agent Peele's testimony that the bullet taken from the victim's body and one of the bullets taken from Kulbicki's truck were "what you'd expect if you were examining two pieces of the same bullet", Mr. Tobin testified that:

> I don't find that to be a valid observation, expectation. There are no data on which to have such an expectation. In other words, there has never been any meaningful or comprehensive research or

(continued...)

been able to posit the likelihood that the chemical composition of the bullet found in the victim could have matched other bullets, not analyzed by the FBI.

Kulbicki's attorneys' failure to appropriately investigate the 1991 Peele Report and to challenge the State's scientific evidence on cross-examination at trial, thus, fell short of prevailing professional norms. Given the serious nature of the charges Kulbicki was facing, along with the fact that CBLA was so persuasively used to connect Kulbicki to the alleged murder scene and murder weapon, it was incumbent on Kulbicki's attorneys "to subject the state's theories to the rigors of adversarial testing" *See Driscoll*, 71

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[13](...continued)
studies to substantially support such an expectation.

Regarding Agent Peele's testimony in which he opined that there was an unusually close compositional similarity to the bullet fragments found in Mr. Kulbicki's truck and in the victim, Mr. Tobin testified:

> That is a meaningless characterization. There is no scientific foundation or validity to be able to make that type of characterization. I mean, there existed a statistical protocol by which to declare a match or non-match. So this is gobbledygook. Either use the protocol and—the analyst should have used the protocol that existed to declare a match.

F.3d at 709. Having failed to research what Agent Peele had published about the forensic evidence about which he was testifying and having also failed to conduct an adequate cross-examination rendered Kulbicki's counsels' performance inadequate.[14]

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[14] We recognize that courts from other jurisdictions have concluded that attorneys did not render ineffective assistance for failing to challenge the State's CBLA evidence. In many of those cases, however, defense counsel actually did challenge the flawed assumption regarding the uniqueness of the lead sources from which the bullets were derived, which Kulbicki's attorneys did not do. *See United States v. Higgs*, 663 F.3d 726, 739 (4th Cir.2011) (observing that trial counsel "impeach[ed] the uniqueness and homogeneity of lead melts, as well as the overall probative value of the CBLA evidence"); *United States v. Davis*, 406 F.3d 505, 509 (8th Cir.2005) (noting that defense counsel offered the testimony of another CBLA expert who observed that the State's expert had not "test[ed] the composition of other bullets available in the community to see if he could find other analytically indistinguishable bullets"). In other cases, the 1991 Peele Report, which was not published before June 24, 1991, was not available to defense counsel. *See Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1350 (11th Cir.2009) (1990 trial); *Libby v. McDaniel*, 2011 WL 1301537 (D.Nev.2011) (1990 trial); *Wyatt v. State*, 71 So.3d 86, 100 (Fla.2011) (noting that in the 1991 trial "the flaws inherent in CBLA science were unknown or not

(continued...)

Our next inquiry, then, is whether Kulbicki's attorneys' failure to adequately cross-examine Agent Peele and to challenge the faulty assumptions upon which Agent Peele's opinion was based prejudiced Kulbicki's case. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. To prevail on the prejudice prong, there must be a showing that the deficient

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[14](...continued)
publically acknowledged at the time of trial.") ("*Wyatt I*"); *Wyatt v. State*, 78 So.3d 512, 533 (Fla.2011) (1991 conviction, adopting the same rationale as *Wyatt I*).

We note, also, that counsels' performance regarding the CBLA evidence and Agent Peele cannot be justified as strategic, because it was not "founded 'upon adequate investigation and preparation.'" *Coleman v. State,* 434 Md. 320, 338, 75 A.3d 916, 927 (2013), quoting *State v. Borchardt*, 396 Md. 586, 604, 914 A.2d 1126, 1136 (2007). Because Kulbicki's attorneys did not refer to the 1991 Peele Report, they could not have made a rational and informed decision as to the scope of their cross-examination of Agent Peele. *See id.; see also Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir.1993) ("Before an attorney can make a reasonable strategic choice against pursuing a certain line of investigation, the attorney must obtain the facts needed to make the decision. An attorney's strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (internal citations and quotations omitted)).

performance created a "substantial possibility" that, but for counsel's errors, the outcome may have been different. *Bowers*, 320 Md. at 425–27, 578 A.2d at 738–39. We recently elucidated the "substantial possibility" standard in *Coleman v. State*, 434 Md. 320, 75 A.3d 916 (2013), in which we opined:

> As to the prejudice prong of *Strickland*, which addresses whether an attorney's deficient performance prejudiced the defendant, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698; *see also Taylor v. State*, 428 Md. 386, 399–400, 51 A.3d 655, 662 (2012). In *Oken*, we explained that the petitioner must show "that there is a substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 343 Md. at 284, 681 A.2d at 44. This Court has noted that "[a] proper analysis of prejudice ... should not focus solely on an outcome determination, but should consider 'whether the result of the proceeding was fundamentally unfair or unreliable.'" *Oken*, 343 Md. at 284, 681 A.2d at 44 (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, 122 L.Ed.2d 180, 189 (1993)); *see also Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693 (explaining that, in determining prejudice, it is important to

consider whether the trial's result was reliable).

Id. at 340–41, 75 A.2d at 928.

We have frequently recognized the significance jurors afford to forensic evidence in assessing a defendant's guilt or innocence. *See Clemons*, 392 Md. at 347 n. 6, 896 A.2d at 1064 n. 6 (noting that "jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials", quoting *Reed v. State*, 283 Md. 374, 386, 391 A.2d 364, 370 (1978)). The importance of the CBLA evidence to the instant matter, moreover, cannot be overstated. Agent Peele testified that the bullet fragments found in Kulbicki's truck and in the victim were "what you'd expect if you were examining two pieces of the same bullet ... two pieces of the same source" Likewise, Agent Peele testified that an unfired cartridge taken from Kulbicki's handgun, while not analytically indistinguishable from the bullet taken from the victim's autopsy, was "unusually close in that that's not what you'd expect, unless there's some association between the two groups."

The State's closing argument relied on forensic evidence to connect Kulbicki to the homicide: "Because we don't have any witnesses who actually saw the Defendant put the gun to [the victim's] head, we fill in the gaps. **And the way we fill them in is with forensic science."** (emphasis added). The State, more specifically, relied in closing on Agent Peele's CBLA analysis, asserting that "those two bullet fragments, the one from [the victim's] head, the one in the Defendant's truck, are the same.... You can't tell

one from the other." Additionally, the State argued to the jury that the bullet found in Kulbicki's handgun was likely the same bullet found inside of the victim: "Even more interesting is Agent Peele's examination of the bullets that he found inside that gun.... Now, think about this. Out of all the billions of bullets in this world, is this just a coincidence that that bullet ends up in the Defendant's off-duty weapon? Is, is that just a coincidence? I don't think so."

Given the State's rigorous reliance on CBLA evidence to connect Kulbicki to the crime, we conclude that there was a "substantial possibility" that the outcome would have been different had Kulbicki's counsel questioned Agent Peele regarding the possibility of having compositionally similar bullets exist in different batches.[15] Having concluded that both prongs of *Strickland* have been satisfied, we hold that the Circuit Court erred in concluding that Kulbicki's attorneys had not rendered ineffective assistance of counsel, and thus, remand for a new trial.[16]

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[15] Although the Circuit Court Judge concluded that Kulbicki was not entitled to post-conviction relief, she also noted the significance of the CBLA evidence, opining that, "[c]learly the bullet analysis was central to the theory of the prosecution."

[16] There may be instances in which a limited remand is the more appropriate remedy for errors committed by post-conviction courts on claims based on ineffective assistance of counsel. For example, in *State*

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JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED; CASE REMANDED TO THAT COURT WITH DIRECTIONS TO VACATE THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AND REMAND THE CASE TO THE CIRCUIT COURT FOR A NEW TRIAL. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY BALTIMORE COUNTY.

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[16](...continued)
v. Thomas, 325 Md. 160, 599 A.2d 1171 (1992), the petitioner, Thomas, had alleged that post-conviction relief was appropriate because his attorney rendered ineffective assistance of counsel by permitting Thomas to be interviewed by a State psychiatrist before sentencing without an attorney. The State argued that the decision was a strategic one, and thus, did not constitute deficient performance. We observed, however, that the post-conviction court did not permit Thomas's attorney to testify as to prior psychiatric assessments of Thomas, and therefore, we were not equipped to discern whether such a decision could be attributed to strategy. Accordingly, we remanded the case for further proceedings.

A limited remand in the instant case is unnecessary because both of Kulbicki's attorneys were questioned substantially regarding their investigation and strategy with respect to the CBLA evidence, of which they had no recollection.

IN THE COURT OF APPEALS OF MARYLAND

No. 13

September Term, 2013

JAMES KULBICKI

v.

STATE OF MARYLAND

Harrell
Battaglia
Greene
Adkins
McDonald
Eldrige, John C. (Retired, Specially Assigned)
Rodowsky, Lawrence F. (Retired, Specially Assigned),

JJ.

Dissenting opinion by McDonald J. which Harrell and Rodowsky, JJ., join

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Filed: August 27, 2014

This is a troubling case—for many reasons. A jury concluded that Petitioner James Kulbicki, a police officer, murdered, execution-style, a young woman with whom he had had an extra-marital affair and by whom he had fathered a child.[1] The evidence supporting that verdict—eyewitness, circumstantial, and forensic—was compelling.[2] But that evidence was not flawless. The analysis that supported one part of the prosecution's forensic evidence at trial was determined, many years later, not to meet the standard for the use of scientific evidence at trial.

The Majority opinion reverses Mr. Kulbicki's conviction on the basis that his trial counsel failed to anticipate that development and thereby provided ineffective assistance of counsel in their cross-examination of the prosecution's forensic expert on "comparative bullet lead analysis" ("CBLA")[3] —a

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[1] This was the second jury to reach that conclusion. Mr. Kulbicki's initial conviction at a 1993 trial was reversed by the Court of Special Appeals on the ground that the Circuit Court should have permitted Mr. Kulbicki to present certain evidence on surrebuttal. 102 Md.App. 376, 649 A.2d 1173 (1994).

[2] See pp.13-15 below.

[3] Some refer to this analysis as "compositional analysis of bullet lead" and use the acronym "CABL." *See* National Research Council, Forensic Analysis: Weighing Bullet Lead Analysis (2004). For the sake of consistency, I will use the acronym adopted by the

(continued...)

ground not briefed by either party in this appeal and not among the questions on which we granted the writ of certiorari in this case.[4]

A criminal defendant's right to the effective assistance of counsel is rooted in the Sixth Amendment to the federal Constitution and Article 21 of the Maryland Declaration of Rights.[5] In order to obtain relief on the ground that his right to effective assistance of counsel was violated, Mr. Kulbicki bears the burden of showing (1) that defense counsel's

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[3](...continued)
parties and used by the Majority opinion to denote this type of evidence.

[4] Mr. Kulbicki's very competent post-conviction counsel did argue that the admission of the CBLA evidence violated due process and also suggested that developments concerning CBLA subsequent to his trial should be treated as newly discovered evidence that could be a basis for vacating his conviction under Maryland Code, Criminal Procedure Article ("CP"), § 8–301. However, the Majority opinion does not base its decision on either of those grounds.

[5] This Court has held that the federal and State constitutional provisions are coextensive. *Lodowski v. State*, 307 Md. 233, 247, 513 A.2d 299 (1986). Thus, Maryland courts apply the standards set forth in *Strickland* in judging claims for post-conviction relief on the ground of ineffective assistance of counsel. *See, e.g., Coleman v. State*, 434 Md. 320, 334, 75 A.3d 916 (2013).

performance was deficient and (2) that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Majority opinion briefly and accurately recites the principles that govern application of those two prongs. But it does not suffice to recite those criteria. A court must apply them. The Majority opinion does not. First, contrary to the principles outlined by the Supreme Court in *Strickland*, the Majority opinion uses information developed long after Mr. Kulbicki's 1995 trial, and not available until years later, to find trial counsel's performance deficient in hindsight. Second, again contrary to *Strickland*, the Majority opinion makes no effort to assess the alleged deficiency in light of the other evidence against Mr. Kulbicki that was unaffected by the alleged deficiency.

Whether Trial Counsel's Performance was Deficient

To establish that his trial counsel's performance was deficient, Mr. Kulbicki must demonstrate that it fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. Judicial review of defense counsel's performance is to be " highly deferential" and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052; *see also Evans v. State*, 396 Md. 256, 274–75, 914 A.2d 25 (2006). Especially pertinent to this case, the reasonableness of counsel's performance must be assessed "as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. In other words, this prong is satisfied only when, "given the

facts known at the time, counsel's choice was so patently unreasonable that no competent attorney would have made it." *State v. Borchardt*, 396 Md. 586, 623, 914 A.2d 1126 (2007) (internal citations omitted).

The Majority opinion holds that Mr. Kulbicki's trial counsel were ineffective because they failed to locate and make use of research concerning CBLA to discredit the forensic value of CBLA evidence generally. At the time of Mr. Kulbicki's trial in 1995, CBLA had been used in criminal trials for nearly 30 years without serious challenge.[6] It is true that this Court ultimately determined that CBLA evidence failed to satisfy the *Frye–Reed* standard for the admission of scientific evidence in Maryland courts. But that decision was not issued until more than a decade after Mr. Kulbicki's trial. *Clemons v. State*, 392 Md. 339, 896 A.2d 1059 (2006). Obviously, Mr. Kulbicki's trial counsel were not deficient in failing to rely on that case. Nor, as of 1995, had any other reported case held such evidence inadmissible.[7]

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[6] CBLA was apparently first developed as part of the investigation of the assassination of President John F. Kennedy. *See* P.C. Giannelli, *Comparative Bullet Lead Analysis: A Retrospective*, 47:2 Crim. L. Bull., Art. 6 (2011).

[7] The reported opinions in which CBLA evidence has been determined to be inadmissible were issued more than 10 years after Mr. Kulbicki's 1995 trial and concerned trials that occurred after the publication of

(continued...)

Nor can the Majority opinion fault Mr. Kulbicki's trial counsel for failing to find and use the various scholarly articles and reports critical of CBLA cited and quoted at length in the *Clemons* decision. They did not exist in 1995. The key articles that questioned the use of CBLA evidence, including those cited in *Clemons*, were not published until 2002 at the earliest, seven years after Mr. Kulbicki's second trial.[8] *See*

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[7](...continued)
reports critical of CBLA in the early 2000s. *See Clemons v. State, supra* (2002 trial; 2006 appellate opinion); *Ragland v. Commonwealth*, 191 S.W.3d 569 (Ky.2006) (2002 trial; 2006 appellate opinion). To the extent that CBLA evidence was challenged prior to Mr. Kulbicki's trial, courts had held that the evidence was admissible. *See Jones v. State*, 425 N.E.2d 128 (Ind.1981); *State v. Krummacher*, 269 Or. 125, 523 P.2d 1009 (1974). Indeed, in re-cross-examination of the prosecution's expert in his case, Mr. Kulbicki's counsel was able to elicit the same point emphasized by the dissent in the *Jones* case—that any of a large number of bullets manufactured by the same maker might be "similar" in composition. 425 N.E.2d at 135.

[8] *See* R.D. Koons, et al., *Compositional Variation in Bullet Lead Manufacture*, 47 J. Forensic Sci. 950 (**2002**); E. Randich, et al., *A Metallurgical Review of the Interpretation of Bullet Lead Compositional Analysis*, 127 Forensic Sci. Int'l 174 (**2002**); W. Tobin & W. Duerfeldt, *How Probative is Comparative Bullet Lead Analysis?* 17 Crim. Just. 26 (**2002**); E. Imwinkelried &
(continued...)

Clemons, 392 Md. at 363–72, 896 A.2d 1059. Those articles spurred the FBI to commission the National Research Council ("NRC") of the National Academy of Sciences to conduct a comprehensive review of CBLA evidence. The definitive NRC Report did not appear until 2004, nearly a decade after Mr. Kulbicki's trial. The NRC Report found that the scientific techniques used to analyze the composition of bullets were sound, but that some inferences drawn from the composition analysis as to the source of particular bullets or fragments were unwarranted.[9] Although the NRC Report did not recommend against the use of CBLA evidence, the FBI ultimately decided to cease providing

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[8](...continued)
W. Tobin, Comparative Bullet Lead Analysis (CBLA) Evidence: Valid Inference or Ipse Dixit?, 28 Okla. City U.L.Rev. 43 (**2003**); W. Tobin, *Comparative Bullet Lead Analysis: A Case Study in Flawed Forensics*, The Champion 12 (**July 2004**).

[9] National Research Council, *Forensic Analysis: Weighing Bullet Lead Evidence* (**2004**) ("NRC Report"). The NRC Report concluded that the analytical techniques employed by the FBI laboratory to determine the composition of bullet lead samples led to sound results. The potential problem lay in the conclusions analysts drew from those results. In the view of the NRC Report, there was some danger that expert witnesses were drawing broader conclusions from the analysis than was warranted, such as assertions that two specimens came from the same box of ammunition. NRC Report at 91–94.

CBLA testimony in 2005. In any event, these developments occurred long after Mr. Kulbicki's trial.

Indeed, at the time of Mr. Kulbicki's trial, the individual widely credited with blowing the whistle on the failings of CBLA—former FBI examiner William Tobin—was still employed at the FBI, was three years away from retirement, and had yet to publish his doubts concerning that analysis. *See, e.g.*, P. Giannelli, *Comparative Bullet Analysis: A Retrospective*, 47 Crim. L. Bull. Art. (Spring 2011) ("[CBLA] was not seriously challenged until a retired FBI examiner, William Tobin, began questioning the procedure in scientific and legal journals and in court testimony as well") (footnotes omitted).[10]

The sole basis on which the Majority opinion finds trial counsel ineffective relates to a single research paper co-authored by six analysts from the FBI's laboratories in Washington D.C. and Quantico, Virginia, including Special Agent Ernest Peele, who testified as one of the prosecution's forensic experts at Mr. Kulbicki's trial. *See* E.R. Peele, et al., *Comparison of Bullets Using the Elemental Composition of the Lead Component* (1991) ("FBI study" or "FBI research

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[10] Indeed, the critical passage from the *Clemons* opinion concerning three underlying premises of CBLA analysis that the Majority quotes, Majority op. at 36–37 n. 2, 99 A.3d at 732 n. 2, is a virtually verbatim quotation of a 2004 article by Mr. Tobin. *See* W. Tobin, *Comparative Bullet Lead Analysis: A Case Study in Flawed Forensics*, The Champion 12 (July 2004).

paper").[11] As an initial matter, it is not entirely clear that the FBI study was readily available outside the FBI at the time of the 1995 trial, even to the most diligent researcher.[12] I have caused a copy of the FBI

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[11] The Majority opinion refers to this study as the "Peele Report." In fact, Agent Peele was one of six co-authors listed on the study.

[12] The Majority provides a hyperlink to show that the FBI study was distributed to depository libraries sometime in 1994, although it is not clear when the article would have been cataloged at any particular library. Moreover, given that depository libraries may select, with some exceptions, the government documents they choose to receive, it is not entirely clear which libraries in the Baltimore vicinity would have had a copy of the FBI study at the time of Mr. Kulbicki's second trial. *See Amending Your Library's Selection Profile,* FDLP (August 19, 2014) http://www.fdlp.gov/requirements–guidance–2/guidance/10–amending-your-library-s-selection-profile. Obviously, Mr. Kulbicki's counsel would not have found a link to the article in the way that the Majority did. In 1995, public use of the Internet was in its infancy. Google did not yet exist. *See Internet Users,* Internet Live Stats (July 31, 2014), http://www.internetlivestats.com/internet-users/#trend (less than 1% of world population had access to Internet in 1995); *World Wide Web Timeline,* Pew Research Internet Project (July 31, 2014), http://www.pewinternet.

(continued...)

study, which is not available online, is still not easy to obtain, and does not otherwise appear in the record of this case, to be posted with this opinion on the "highlighted cases" portion of the Court's website. http://mdcourts.gov/coappeals/highlightedcases/index.html#kulbicki.

Of course, assuming trial counsel could even locate the FBI research paper, what would they have done with it? The FBI study does not criticize the use of CBLA as a forensic tool. Indeed, the FBI study reports

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[12](...continued)
org/2014/03/11/world-wide-web-timeline/ (as of 1995, 18 million Americans were online, but only 3% of that number had ever signed on to the world wide web).

In a federal district court case concerning alleged discovery violations related to CBLA evidence, it was alleged that the FBI study was not publicly available at the time of a 1999 trial—a trial that occurred four years after Mr. Kulbicki's trial. Ultimately, the court did not resolve that question, given that a similar study had been published in 1999. *See United States v. Higgs*, 711 F.Supp.2d 479, 494 & n. 5 (D.Md.2010), *aff'd*, 663 F.3d 726, 738 (4th Cir.2011).

In any event, the Majority's assumption that an attorney providing effective assistance of counsel in 1995 would necessarily have found this FBI research paper is highly speculative.

that 25 years of study of analytical data collected by the FBI has led to the conclusion that "if two bullets are produced from the same homogenous source of lead, then they will have analytically indistinguishable compositions." FBI study at 57. The goal of the study was to "define the variability in element composition within individual bullets, among bullets within boxes of cartridges, among boxes packaged on the same date, among boxes packaged on different dates, and among boxes from different manufacturers." *Id.* After summarizing the numerical results of the study, the paper concludes that CBLA provides useful forensic results. For example, it states that "when compositional overlap between boxes occurs, it is more reasonable to expect the overlap from boxes of the same types and brand of bullet, packaged near the same date." *Id.* at 68. The paper ends with a hypothetical example involving the use of CBLA evidence in a criminal case—involving facts very similar to Mr. Kulbicki's case—and concludes: "It is our opinion that these results are forensically significant in associating the victim, weapon, and suspect in this example." *Id.* A defense attorney who happened to locate the FBI study might reasonably decide that using it would be counter-productive to any effort to refute the CBLA evidence in Mr. Kulbicki's case.

The only use that the Majority opinion suggests that Mr. Kulbicki's counsel could have made of the paper was to point out that there might be overlapping compositions of bullets packaged on different dates. Majority op. at 48–53, 99 A.3d at 739–42. In fact, the FBI study reported that, for two manufacturers—CCI

and Remington—"there are no compositional group overlaps among bullets from boxes with different assembly and packaging dates." FBI study at 61. There were overlapping compositions for bullets packaged on different dates for one manufacturer—Federal—but the FBI study concluded that this was attributable to a common lead production source and component storage before loading by that manufacturer. *Id.* at 61–62. A more complex compositional group distribution finding for a fourth manufacturer was attributed to the same reasons. *Id.* at 62. After analyzing all of the data, the study concluded that "[c]ompositional group overlap among bullet leads are generally expected from boxes with the same assembly and packaging dates and not expected from boxes with widely different dates." *Id.* at 68.

In an apparent concession that the FBI study actually supports the use of CBLA evidence, the Majority opinion criticizes the FBI study as being "at odds with the scientific method" and "inconsistent with the scientific method." Majority op. at 50–51 & n. 11, 99 A.3d at 740 & n. 11. Although it is not entirely clear from the Majority opinion, it appears that the Majority believes that trial counsel should have located the FBI study in 1995, somehow used it to discredit CBLA evidence generally during cross-examination of Agent Peele at Mr. Kulbicki's trial, and then simultaneously debunked the study's methods and conclusions as "inconsistent with the scientific method." This would have been a peculiar way to advance Mr. Kulbicki's defense. Whether or not the Majority's critique of the FBI study is valid, it is not the study that is under review here—it is defense

counsel's performance at the 1995 trial.

The Majority opinion downplays the extent to which defense counsel actually cross-examined Agent Peele at trial about the CBLA evidence. Mr. Kulbicki's trial counsel cross-examined Agent Peele at some length and in detail concerning the CBLA analysis. He obtained concessions that there was no industry-wide standard for lead composition of bullets, that Agent Peele could not identify the manufacturer of any of the bullets in question, that any manufacturer would make many bullets, that bullets in one box of ammunition could have different compositions, that one of the bullets from Mr. Kulbicki's gun was similar to but "measurably different" from the bullet fragments from the autopsy and truck and that he could not be certain they had a common source, that the other bullets from Mr. Kulbicki's gun were so different from the bullet fragments that Agent Peele did not place them in the same "group," and that a random bullet handed to the Agent could have a "similar" composition to the bullet fragments and bullets he tested.

Although the cross-examination was not the precise critique of CBLA that was later made in academic articles and the NRC Report, defense counsel was able to point out that the inferences drawn from composition analysis were not as rigorous as the composition analysis itself. And, in the end, Agent Peele's testimony was not inconsistent with the results reported in the FBI study. It is not at all clear what the use of that study by defense counsel during cross-examination would have added, other than to

allow the prosecution to ask Agent Peele on re-direct about the conclusion of the FBI study that CBLA yielded forensically significant conclusions in murder cases.

The only post-conviction case concerning forensic evidence that the Majority cites in support of its decision actually illustrates how aberrational the Majority opinion is. *See* Majority op. at 47–49, 99 A.3d at 738–39, discussing *Driscoll v. Delo*, 71 F.3d 701 (8th Cir.1995). That case arose out of a prison riot during which two officers were stabbed, one fatally. Driscoll was charged with the stabbing that resulted in death. A key question at the murder trial concerned the absence of the murder victim's blood type—type O—on the defendant's knife. A serologist testified at trial that a particular test that she had performed would not detect type O blood if type A blood (which happened to be the blood type of the surviving victim) was also on the knife. The Eighth Circuit held that trial counsel had provided ineffective assistance of counsel in failing to ask the serologist whether she had performed *another* test that would have detected type O blood even in the presence of type A blood. The court noted that defense counsel asked only two questions of the serologist in cross-examination and that it was evident from the lab report defense counsel received in discovery that the serologist was able to detect both blood type A and blood type O together on other evidence. 71 F.3d at 709. By contrast, in this case, Mr. Kulbicki's counsel cross-examined Agent Peele extensively, asking more than 70 questions (which was considerably more questions than the prosecutor asked on direct and re-direct examination

combined), making use of the Agent's report to obtain concessions, and introducing exhibits. And there is no suggestion that Mr. Kulbicki's counsel received anything in discovery that provided any clue to the general flaws in CBLA analysis that were unearthed many years later.

There is no question that, as developments subsequent to Mr. Kulbicki's trial revealed, some inferences that had been drawn by FBI examiners from lead compositional analysis were seriously flawed. Whether an individual convicted at a trial at which such evidence was introduced should receive a new trial on the ground of newly-discovered evidence under the standards governing a writ of actual innocence (CP § 8–301) is a serious question. But, in the context of a claim of ineffective assistance of counsel, the Majority fails to take into account the standard that we are to apply to trial counsel's performance. Our review of counsel's performance is to be "highly deferential" and must take account of the information available and facts known to counsel *at the time of trial*. *Strickland*, 466 U.S. at 689–90, 104 S.Ct. 2052.[13] To hold that Mr. Kulbicki's 1995 trial

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[13] "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged

(continued...)

counsel should have foreseen the subsequent developments with respect to CBLA analysis—most of which did not occur until the next decade—is to impose, in Judge Moylan's pithy phrase, an "obligation to prophesy."[14]

Boiled down to its essence, the Majority opinion holds that Mr. Kulbicki's trial counsel should have discovered and unraveled the flaws in CBLA analysis before anyone else did by locating and using an obscure research paper—a paper that actually endorsed the use of CBLA to link a defendant to a crime involving a firearm, including murder cases in particular. That is simply not a basis on which to find that Mr. Kulbicki's trial counsel were deficient.

Whether There was Prejudice

To establish prejudice, Mr. Kulbicki "must show that there is a reasonable probability that, but for

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[13](...continued)
conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (citations omitted). *See also State v. Calhoun*, 306 Md. 692, 735, 511 A.2d 461 (1986) ("There was no duty on counsel to foresee that we might hold as we held [subsequently concerning admissibility of certain evidence]").

[14] *State v. Gross*, 134 Md.App. 528, 577, 760 A.2d 725 (2000), *aff'd on other grounds*, 371 Md. 334, 809 A.2d 627 (2002).

counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *Denisyuk v. State*, 422 Md. 462, 470, 30 A.3d 914 (2011). Even if counsel's performance is deficient, prejudice is not ordinarily presumed, except in rare cases. *Redman v. State*, 363 Md. 298, 310–13, 768 A.2d 656 (2001). Thus, even if he can establish that his trial counsel's performance fell outside the "wide range of reasonable professional assistance" described in *Strickland*, Mr. Kulbicki must also show that there is a substantial possibility that the result of his trial would have been different. *Id.*

The issue of prejudice must be assessed in relation to the other evidence in the case. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the ... jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways.... Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 695–96, 104 S.Ct. 2052.

A reader of the Majority opinion might be excused for believing that the evidence against Mr. Kulbicki began and ended with CBLA testimony. The Majority opinion makes no effort to consider the testimony, exhibits, and other forensic evidence that tied Mr. Kulbicki to the crime. That evidence is largely

recounted in the opinion of the Court of Special Appeals in this case,[15] and I will not repeat it here other than to summarize the main items:

- Mr. Kulbicki, a married 36–year–old police officer, had engaged in an on-again and off-again extra-marital affair with Gina Marie Neuslein, the 22–year–old victim. That relationship had occurred over the course of at least two years, had resulted in two pregnancies, and, at the time of the murder, had been recently terminated by Ms. Neuslein.

- Ms. Neuslein instituted child support proceedings against Mr. Kulbicki. Although Mr. Kulbicki adamantly denied that he had had sex with her (a denial he repeated to detectives investigating the murder), a paternity test established that he was the father of her 18–month old child and a court hearing was scheduled in the child support proceeding. Ms. Neuslein was murdered the weekend before the scheduled hearing. (At his murder trial, Mr. Kulbicki conceded that he had fathered the child).

- On the day before the murder, Mr. Kulbicki picked up Ms. Neuslein in his truck while she was walking to her job at a Royal Farms

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[15] *Kulbicki v. State*, 207 Md.App. 412, 418–28, 53 A.3d 361 (2012).

Store and dropped her off at the store. According to a fellow employee, Ms. Neuslein arrived upset and appeared to have finger marks on her face. Later that evening, Mr. Kulbicki was observed sitting in his truck outside the store and later in an alley near the Neuslein residence.

- On the day of the murder, Ms. Neuslein was apparently abducted while walking to work and killed shortly thereafter by a close range gunshot to the head. Her body was found in a state park some distance from her residence and workplace.

- Based on the condition of Ms. Neuslein's body and the location where it was found—signs that the body had been dragged and the absence of shell casings or bullets in the vicinity—homicide investigators concluded that the murder had been committed elsewhere and the body transported to the park.

- During the time frame of the murder, as estimated by the medical examiner, an eyewitness observed Mr. Kulbicki in his truck at the area of the park where Ms. Neuslein's body was found.

- A search of Mr. Kulbicki's home two days after the murder resulted in the seizure of Mr. Kulbicki's denim work jacket, which had a blood stain that matched Ms. Neuslein's

DNA and blood type, but not Mr. Kulbicki's. *69 A .38 caliber revolver was also seized from Mr. Kulbicki's home and was determined to be operable.

- The police also seized Mr. Kulbicki's truck two days after the murder. Although the interior of the front of the truck appeared to have been cleaned, investigators found human bone fragments (including a larger fragment identified as a skull fragment), a bullet fragment, and human blood stains.

- Expert serology and DNA analysis linked Ms. Neuslein to the bone fragments and blood stains in Mr. Kulbicki's truck. DNA analysis of the bone fragments found in Mr. Kulbicki's truck excluded Mr. Kulbicki but were sufficiently consistent with Ms. Neuslein's DNA such that she could not be excluded. A number of the blood stains in the truck also bore genetic markers consistent with Ms. Neuslein's blood, but inconsistent with Mr. Kulbicki's.

- Expert testimony by a Smithsonian scientist established that the larger bone fragment in Mr. Kulbicki's truck had been created by a tremendous amount of traumatic force, consistent with a contact gunshot wound, and contained lead and carbon deposits.

- Expert ballistics analysis—not CBLA analysis—of the bullet fragment from Mr.

> Kulbicki's truck established that it had markings consistent with being fired from a .38 or larger caliber gun.

None of this evidence depended on the CBLA analysis. The Majority opinion makes no mention of it.

Mr. Kulbicki's post-conviction counsel have, at various times, challenged the admissibility of other items of evidence and other aspects of his trial, but the Majority opinion does not purport to find merit in any of those challenges.

Conclusion

If Mr. Kulbicki's trial counsel were ineffective, it was not with respect to their challenge of the CBLA evidence. Neither prong of *Strickland* is satisfied here. As the Majority appears to concede, no other court that has considered a similar claim of ineffective assistance of counsel has held that the failure to discover the flaws in CBLA evidence at a trial held during the 1990s amounted to ineffective assistance of counsel.[16]

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[16] *See, e.g., United States v. Davis*, 406 F.3d 505, 508–10 (8th Cir.2005) (not ineffective assistance of counsel at 1995 trial when research used to challenge CBLA evidence in post-conviction proceeding did not begin until three years after trial and some limitations of that evidence ultimately exposed in research were raised by defense at trial); *Smith v. Department of Corrections*, 572 F.3d 1327, 1350 (11th Cir.2009)

(continued...)

To conclude that Mr. Kulbicki's trial counsel were ineffective in not discrediting CBLA analysis before anyone else raised doubts about CBLA evidence is to distort the *Strickland* standards. One might chalk that up to the cliche that hard cases make bad law.[17] But while, for many reasons, this may be a hard case, the question whether trial counsel were ineffective with respect to the CBLA evidence is not.

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[16](...continued)
(defense counsel not required to anticipate future developments concerning CBLA evidence at 1990 trial); *Libby v. McDaniel*, 2011 WL 1301537, at *8–9 (D.Nev. 2011) (same; 1990 trial); *Robertson v. State*, 2009 WL 277073 (Tenn.Crim.App.2009) (same; 1998 trial); *Wyatt v. State*, 71 So.3d 86, 103 (Fla.2011) (defense counsel did not provide ineffective assistance of counsel with respect to CBLA evidence at 1991 trial when comprehensive research concerning flaws in CBLA evidence did not exist until well after that trial); *Wyatt v. State*, 78 So.3d 512, 527 (Fla.2011) (same result with respect to same defendant, but different trial); *see also United States v. Higgs*, 663 F.3d 726, 739 (4th Cir.2011) (defense trial counsel was not ineffective at 2000 trial in failing to ferret out internal FBI studies of CBLA that pre-dated published studies, particularly when counsel obtained important concessions on cross-examination).

[17] *See Northern Securities Co. v. United States*, 193 U.S. 197, 363, 24 S.Ct. 436, 48 L.Ed. 679 (1904) (Holmes, J., dissenting).

All of this is not to say that the use of the CBLA evidence in Mr. Kulbicki's trial is not troubling. Post-conviction counsel briefed and argued before us other grounds on which to vacate Mr. Kulbicki's conviction based on other legal theories related to the use of the CBLA testimony at his trial. See footnote 4 above. Although my inclination would be to find that those bases are either without merit or not ripe at this time,[18] they would have formed a sounder basis for the Majority's decision without distorting the law governing ineffective assistance of counsel.

Judge Harrell and Judge Rodowsky have authorized me to say that they join this opinion.

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[18] Those courts that have considered due process challenges to the use of CBLA evidence have rejected that argument. *See* Annotation, *Use and Effect of Comparative Bullet Lead Analysis (CBLA) in Criminal Cases*, 92 ALR 6th 549 (2014) at § 21 (collecting cases). Mr. Kulbicki has not yet followed the procedures set forth in Maryland Rule 4–332 to seek a writ of actual innocence under CP § 8–301 on the ground of newly discovered evidence.

JAMES KULBICKI	*	In the
	*	Court of Appeals
v.	*	of Maryland
STATE OF MARYLAND	*	No. 13
	*	September Term, 2013

CORRECTED
ORDER

The Court having considered the motion for reconsideration and stay of mandate filed in the above-captioned case, it is this twenty-first day of October, 2014,

ORDERED, by the Court of Appeals of Maryland, that the above motion and stay be, and they are hereby, DENIED.

/s/ Lynne A. Battaglia
Judge

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2940

September Term, 2007

JAMES ALLEN KULBICKI

v.

STATE OF MARYLAND

Wright,
Matricciani,
Watts,

JJ.

Opinion by Wright, J.

Filed: September 26, 2012

Following a jury trial in the Circuit Court for Baltimore County, appellant, James Kulbicki, was convicted of first degree murder on October 20, 1993. On December 1, 1994, this Court reversed and remanded for a new trial. *Kulbicki v. State*, 102 Md.App. 376, 649 A.2d 1173 (1994). On November 22, 1995, Kulbicki was again convicted, by a jury, of murder, as well as a related handgun charge. He was sentenced to life in prison without parole. On December 20, 1996, this Court affirmed Kulbicki's convictions, and on April 9, 1997, the Court of Appeals denied Kulbicki's petition for writ of certiorari. *Kulbicki v. State*, 345 Md. 236, 691 A.2d 1312 (1997).

On or about March 17, 1997, while his request for certiorari review was pending, Kulbicki filed a petition for postconviction relief. After filing several amendments and repeatedly seeking postponements of his postconviction proceedings, Kulbicki filed an amended petition for postconviction relief on April 4, 2006. Following a five-day hearing in April 2007, the circuit court denied postconviction relief through an opinion and order dated January 2, 2008. Kulbicki then filed an application for leave to appeal the denial of postconviction relief, which this Court granted on March 9, 2010.

Questions Presented

We have rephrased and renumbered the questions

presented by Kulbicki, as follows:[1]

1. Where Kulbicki alleged that his conviction was based on unreliable, false, and misleading scientific evidence, did the postconviction court correctly conclude that he did not have a cognizable due process

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[1] Kulbicki presented these two issues for our review:

> 1. Whether a defendant who has been convicted on the basis of unreliable scientific evidence has a due process claim cognizable through the Uniform Post Conviction Procedure Act.
>
> 2. Whether the Circuit Court erred by denying Appellant a new trial when the evidence established that 1) the State used unreliable, false, and misleading scientific evidence; 2) the State introduced perjured expert testimony; 3) Appellant's attorneys failed to investigate and challenge the scientific evidence presented by the State; and 4) Appellant's attorneys failed to object when the State told the jury that Kulbicki's consultation with an attorney following his arrest constituted evidence of guilt and his appellate counsel failed to raise the issue on appeal.

However, in the argument section of his brief and at oral argument, Kulbicki set forth three issues.

claim?

2. Where Kulbicki alleged that the State used perjured, false, and misleading expert ballistics testimony in securing his conviction, did the postconviction court correctly find that he was not denied a fair trial?

3. Did the postconviction court correctly conclude that Kulbicki failed to establish his ineffective assistance of counsel claim?

For the reasons that follow, we affirm the circuit court's judgment.

Facts

The testimony at Kulbicki's 1995 trial established that at about 8 a.m. on Sunday, January 10, 1993, Walter Kutcha was walking his dog near the archery range at Gunpowder State Park when he saw a body lying by one of the trash cans. Suspecting "foul play," Kutcha went to a park ranger's cabin and came back with Ranger Ross Harper. Upon their return, Kutcha and Ranger Harper discovered that the body was that of a deceased woman, lying on her back.

Officers of the Baltimore County Police Department responded to the scene at approximately 8:30 a.m. Detective William Ramsey, a member of the Baltimore County Police Department's Homicide and Missing Persons units, testified that he arrived at 10:18 a.m. and began his investigation. He observed blood on the

victim's forehead, around her nose, and on the right side of her shoulder. Det. Ramsey also noted that the victim's jewelry had not been removed. Upon turning the body over, Det. Ramsey saw a wound near the back of the victim's head, but no blood on the ground underneath. Based on the leaves and debris under the victim's jacket, the position of her clothes and arms, the disturbance of the leaves and debris in an area leading toward the body, as well as the absence of bullets and shell casings on the surrounding ground, Det. Ramsey concluded that the victim had "been killed somewhere else and taken there and ... dragged there and dumped."

Det. Ramsey unzipped the victim's jacket and saw that she was wearing a Royal Farms store smock with a name tag that said "Gina." While Det. Ramsey was conducting his investigation, he received a call from the Baltimore City Police Department instructing him to contact the city's Homicide Unit. Upon doing so, Det. Ramsey was informed that the city police were " investigating a missing girl from Baltimore City." Eventually, the Baltimore City Homicide Squad arrived at the crime scene, along with "a subject ... who identified the victim as Gina Marie Neuslein."

Geraldine Neuslein, Gina's mother, testified that she last saw Gina on Saturday, January 9, 1993, when Gina left to walk to work at around 3:30 p.m. At about 4:10 p.m., Geraldine received a call from Gina's employer, stating that Gina never arrived.

During Det. Ramsey's investigation, he received "information over the radio that there was an

individual who might have some information relative to the crime." Det. Ramsey sent an officer to interview that witness, Barbara Clay. At trial, as a witness for the State, Clay testified that at approximately 3 p.m. on January 9, 1993, she and her son went to the archery club at Gunpowder State Park. As they were leaving the parking area around 4:40 p.m., she saw a black Ford pickup truck coming down the road with its headlights on. When the truck turned into the parking area, it passed parallel to Clay's vehicle, about four feet away. With her window down, Clay raised her hand, "yelled and [ ] said hi." The driver of the truck "[s]lowly looked at [her] full face" but did not respond. Clay identified the driver as Kulbicki.

After passing the truck, Clay drove about one third of a mile down the road and parked, hoping to see some deer. After waiting approximately fifteen minutes, Clay left with her son. She did not see the truck leave, nor did she see any other vehicles enter the area.

The next morning, Clay heard information from a television news program that prompted her to call the Baltimore County Police Department.[2] Upon calling the authorities, Clay relayed information that was not provided on the news. Specifically, she told an officer that she "had seen a white male in his mid-thirties

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[2] Although Clay did not provide details about the news program because it was hearsay, it is presumed that she heard information about a body being found at Gunpowder State Park.

driving a Ford longbed pickup truck" at the archery range parking lot at Gunpowder State Park. Clay added that the driver had dark hair and "was wearing a dark jacket with a contrasting lighter shirt."

On the evening of January 13, 1993, Clay saw a television broadcast showing a man in shackles being arrested. Because of the man's "very distinctive profile, [and] very distinctive nose," Clay "without doubt, [ ] knew that was the man that [she] saw at Gunpowder State Park." Thus, Clay called the police and told them that she "recognized that man that they had arrested ... as being the man that [she] saw."

Shortly after Det. Ramsey concluded his investigation at the park on January 10, 1993, he received information that prompted him to visit the home of James Kulbicki, a sergeant of the Baltimore City Police Department, to ask questions about Gina. Det. Ramsey was accompanied by his partner, Detective Robert Capel. Kulbicki told the detectives that "he did know Gina and has been friends with her for about four years." Without prompting, Kulbicki added that he and Gina were "very good friends, although they've never had a sexual relationship."

Kulbicki stated that he last saw Gina at around 3:30 p.m. on Friday, January 8, 1993, when he picked her up close to her house and drove her to work. Kulbicki also stated that he last spoke to Gina when she called him on "Friday night at midnight into early Saturday morning." When Det. Capel informed Kulbicki that Gina's body was found in Baltimore County, Kulbicki said he suspected that was the case,

because the detectives admitted they were from the Homicide Squad. Kulbicki did not ask where and how Gina was killed. According to Det. Capel, Kulbicki "just said he didn't have anything to do with it."

The detectives asked Kulbicki about an upcoming paternity hearing scheduled for the following Wednesday as well as genetic tests indicating that Kulbicki was the father of Gina's 18–month old child. In response, Kulbicki said:

> Well, that's absolutely impossible that I'm the father. I don't believe in genetic tests. And the only reason why they'd even be closest, because we're both Slavic.... I've never had sex with her.

When the detectives first interviewed Kulbicki, his black Ford pickup truck was parked outside the house. The following day, the police returned with a warrant. They seized, among other things: Kulbicki's pickup truck, which had not been moved since the detectives' prior visit; a denim jacket taken from a hall closet; and a fully loaded .38 Smith & Wesson revolver with a two-inch barrel and its leather holster.

Detective Patrick Kamberger, a Crime Lab mobile technician with the Baltimore County Police Department, processed Kulbicki's truck on January 11, 1993. Det. Kamberger testified that the truck, a 1988 Ford F250, had a "filthy" exterior, but "inside the truck appeared to be clean." The first thing he noticed when he opened the door was "a smell [of] household cleaner." According to Det. Kamberger, there was no surface dust on the dashboard or around the steering

wheel, and the floorboard underneath the driver's floor mat was damp, although the mat itself was dry.

Det. Kamberger noticed that a piece of red plastic molding was missing from the rear passenger-side window, revealing a rubber strip that had metallic marks. Beneath the rubber strip, Det. Kamberger noticed "an impact area" or "i[n]dentation." Subsequent chemical testing of the rubber strip established that the rubber was struck by something made of lead. A piece of red plastic fitting the damaged molding area was found in the truck bed.

Inside the cab, there was no blood visible to the naked eye. Preliminary examination of the truck using ultraviolet light, however, indicated the possibility that blood stains were present. Therefore, Det. Kamberger requested the assistance of a serologist from the Maryland State Police Department.

The serologist, Matthew Abbott, was accepted by the circuit court as an expert in the area of forensic serology. He testified that fourteen blood stains were found on seven areas of the truck, including the driver's side door, floor mat, seat belt, bench seat, rear bench seat, rear floor mat, and underneath the rear floor mat. According to Abbott, the stains found on the cloth seat belt, the seat belt's plastic cover and tags, bench seat, underneath the bench seat, and underneath the rear floor mat were human and bore genetic markers consistent with the victim's blood and inconsistent with Kulbicki's. Additional stains on the seat belt, seat belt patch, bench seat, back of the bench seat, rear bench seat, and rear floor mat indicated

human blood, but further testing was not possible. Similarly, due to the small samples found on the driver's side door and floor mat, Abbott was able to detect the presence of blood on those areas, but could not conclude anything further.

The denim work jacket seized from Kulbicki's hall closet had what appeared to be blood stains clearly visible on the left sleeve. Det. Capel testified that when Kulbicki had reviewed the list of property being taken, he asked, "The jacket that you're taking, is that my jean work jacket?" Kulbicki did not ask about any of the other items.

Linda Watson, a Forensic Chemist Supervisor in the Biology DNA Unit at the Maryland State Police Crime Laboratory, stated that she extracted DNA from the blood stain found on the jacket. After processing the sample, she concluded that "the DNA type obtained from the blood stain on the jacket matche[d] the DNA profile developed from the blood of Gina Marie Neuslein." According to Watson, the probability of a random match in the Caucasian population was one in seven million.

Assistant Medical Examiner James Locke testified that he had performed an autopsy on the victim at 9 a.m. on January 11, 1993. Locke stated that the victim, a twenty two-year-old white female, died of "a contact gunshot wound to the head," and that the manner of death was homicide. According to Locke, the abrasions on the victim's body and the condition of her clothing were consistent with having been dragged over the ground. Although the time of Gina's death

could not be precisely determined, Locke stated that a time of "four or [five] o'clock in the afternoon, January the 9th of 1993, is [ ] consistent" with his findings.

Locke testified that the fatal bullet traveled diagonally, from front to back and left to right, through Gina's head. The entrance wound had a "keyhole fracture," indicating that "the bullet entered at a very sharp angle and not directly perpendicular to the skull or to the scalp." Therefore, "a portion of the skull entered into the brain and, also, a portion of the skull may have exited from the body." There was also an exit wound from which "a piece of bone ... or a piece of the bullet had exited from the scalp." A fragment of the bullet was recovered from one side of the brain.

Locke added that evidence of burning on the margin of the entrance wound indicated that the barrel of the gun was placed directly against the victim's head. Extensive bleeding and bruising under the scalp on the right side indicated that Gina's head had hit a hard surface. According to Locke, evidence from the autopsy was "consistent with the passenger of the car being shot by a driver."

When police searched Kulbicki's vehicle, they found a small object near the rear passenger seat. Subsequent testing established that its major components were calcium and phosphorus, the major components of bone. The fragment also contained "some lead." While vacuuming the truck, the police found three other bone chips and a smaller bone fragment.

Dr. Douglas Owsley, a curator and division head for the Department of Anthropology at the Smithsonian Institution's National Museum of Natural History, examined the larger bone fragment using a "stereo zoom microscope" and determined that it was part of the outer layer of a human skull. According to Dr. Owsley, fractured edges indicated that "a tremendous amount of traumatic force ... caused the evulsion of this bone fragment." In addition, the presence of embedded lead and carbon deposits was "consistent with a contact gunshot wound." Testing of the smaller bone chips also revealed metallic particles embedded in the bone, as well as soot deposits and evulsion fracturing.

Karen Quandt, a senior molecular biologist who was admitted as an expert in DNA profiling, testified that she performed RFLP[3] DNA testing on the skull

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[3] According to testimony presented by the State at trial, RFLP, or Restriction Fragment Length Polymorphism, "is the DNA test that most of the public is familiar with." RFLP generates:

> bands that you see on a piece of x-ray film.
>
> * * *
>
> The basis of RFLP testing is ... looking at different areas of a person's gene, ... or their DNA. When we look at a combination of different sites, [the presence of] more sites ... indicates a

(continued...)

fragment and PCR[4] DNA testing on the three bone chips. Four of the seven band patterns revealed by the RFLP testing matched those of Gina. Because other bands could not be visualized due to sample degradation, Quandt testified only that Gina could not be excluded as the source of the bone fragment. PCR testing, which can be performed on smaller or more degraded samples, likewise indicated that Gina could not be excluded as the source of the bone chips. According to Quandt, the frequency of the PCR type found in the bone chips was 1 in 640 among Caucasians.

The State also presented the testimony of Ernest Peele, an agent with the Federal Bureau of Investigation ("FBI") who was admitted as an expert in bullet and lead pellet composition analysis, also known as Comparative Bullet–Lead Analysis ("CBLA").[5] Peele explained that, by performing trace

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[3](...continued)
strong probability or possibility of that person having deposited a specific biological fluid.

[4] PCR, or polymerase chain reaction "takes a small amount of DNA, amplifies it millions of time[s] over to a quantity that [is detectable]."

[5] The technique is sometimes referred to as "Compositional Analysis of Bullet Lead." *See United States v. Berry*, 624 F.3d 1031, 1035 (9th Cir.2010); *see also Clemons v. State*, 392 Md. 339, 365, 896 A.2d 1059
(continued...)

element analysis, CBLA allowed comparison of the bullet fragment recovered during the autopsy and the bullet fragment found in Kulbicki's truck, as well as six unfired cartridges seized from Kulbicki's handgun. Peele testified that the bullet fragments from Gina's brain and Kulbicki's truck exhibited "the same amounts of each and every element ... detected," and were thus "analytically indistinguishable." Peele added that the results were "what you'd expect if you were examining two pieces of the same bullet, they are that close, two pieces of the same source."

After comparing one of the bullets from Kulbicki's handgun, labeled Q–6, to the bullet fragments, labeled Q–1 and Q–2, Peele concluded that the Q–6 bullet was "measurably different," but "unusually close in that that's not what you'd expect, unless there's some association between the two groups," such as "being made by the same manufacturer on or about the same time." Nonetheless, Peele opined that the Q–6 was "close enough that I have seen those differences, ... but, certainly, they are also different enough that I can't really include [it] as well as I would Q–1 and 2 to each other." Peele further stated that although the composition of the six unfired cartridges, labeled Q–4 through Q–9, differed, "these differences are not very large." According to Peele, the differences "can be expected" as "there are usually a number of different compositions in one box."

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[5](...continued)
(2006).

On cross-examination, defense counsel concentrated on differentiating the unfired cartridges from the bullet fragments. The following transpired:

> Q: [W]hen compared to Q–6, which was a bullet which was provided to you or a cartridge for your examination for comparison with Q–1 and Q–2, that, you've testified, is measurably different, correct?
>
> A: Yes, sir. The amounts of arsenic and copper are slightly different.
>
> Q: Well, slightly different, is that something else [than] measurably different?
>
> A: No, sir. The same.
>
> * * *
>
> Q: However, you cannot state that samples Q–4, 5, 6, 7, 8, and 9 are consistent with Q–1 and Q–2 as having come from the same box, correct?
>
> A: Q–6 is much more so than any of the rest. Q–6 is so close that, certainly, that could have been in the same box.
>
> Q: It, it could have been?
>
> A: Certainly.
>
> Q: But you're not sure of that, correct?

A: No, sir, I'm not sure of that.

Joseph Kopera, an examiner with the Maryland State Police Firearms Unit, was presented as an expert in the field of firearms identification. Before he was admitted as an expert, he was asked a few qualifying questions, including the following:

Q: Okay. Were you a graduate of this profession as a result of formal school?

A: There are no colleges or universities here in the United States at all that offer a degree in the field of firearms identification for ballistics. All expertise is obtained through on-the-job training. I served an apprenticeship for five years with the Baltimore City Police Department and the FBI in obtaining this expertise.

My educational background, my personal educational background is I hold a degree in engineering from Rochester Institute of Technology and, also, engineering degree from the University of Maryland here in the State of Maryland. I am on the Board of Directors for the Association of Firearm and Toolmark Examiners, which is the certifying society of firearm examiners here in the United States. I'm also on the staff at several local colleges, did teaching in the area of forensic science and criminal justice.

Q: And how many firearms-related cases do you examine per year, on the average?

A: On the average for a 20–year period, I would examine anywhere between 1,000 to [1,200] cases, of which I would testify in court between 100 to 125 times per year.

Q: Have you had an occasion in the past to qualify as an expert in firearms identification?

A: Yes, I have qualified in the [s]tate of Maryland, states of Virginia, Pennsylvania, Delaware and the Federal courts here in the United States.

After being accepted by the court as an expert, Kopera testified that the bullet fragment found in Kulbicki's truck had cannelures, or markings, consistent with "a large caliber" such as .38 or larger. Kopera also stated that damage to the rubber stripping inside Kulbicki's truck was caused by a bullet fragment. According to Kopera, the bullet only ripped the area, and did not create a hole, because it "was slowed down by hitting something else prior to hitting the rubber piece." On cross-examination, Kopera testified that Kulbicki's handgun "had been examined and found to be in the cleaned condition."

The defense presented evidence that Kulbicki was running errands in his truck on the afternoon of January 9, 1993. Numerous witnesses testified to seeing Kulbicki at their respective businesses

sometime between 3 and 4 p.m. that day. All of those witnesses knew, had previously worked with, or were familiar with Kulbicki. In addition, Kulbicki's wife testified that Kulbicki was with her from 4:30 p.m. until he left for work at about 10:45 p.m.

Kulbicki, who took the stand on his own behalf, denied killing Gina.

During closing arguments, the prosecutor went over all of the evidence, "fill [ing] in the gaps" of the case with "forensic science." The State's argument, which spanned thirty-three pages of transcript, included the following two paragraphs regarding Peele's and Kopera's testimony:

> From that bullet fragment, you heard from ... Mr. Kopera, who examined it and who ... told you about the cannelures ... that he saw on the bullet fragment retrieved from Gina's head which told him both of these fragments came from a .38 caliber bullet.
>
> And then from ... Mr. Peele, the FBI Agent, we learn that compositionally when it is broken down to parts per million into that minute detail those two bullet fragments, the one from Gina's head, the one in the Defendant's truck, are the same, are the same. You can't tell one from the other.

After deliberating, the jury convicted Kulbicki of first degree murder.

In 2006, Kulbicki filed an amended petition for postconviction relief. The circuit court conducted a hearing on the petition from April 19 through 25, 2007. Kulbicki argued:

> He did not receive a fair trial because the State used inaccurate, misleading and unreliable scientific evidence. He did not receive a fair trial because the State failed to disclose exculpatory evidence in violation of its Brady[6] obligations. He did not receive a fair trial because his defense attorneys failed to properly perform their duties as required by the Sixth Amendment[7] of the [C]onstitution.

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[6] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[7] The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In particular, Kulbicki challenged "four pillars" of the State's case: (1) FBI Agent Peele's conclusions based on CBLA; (2) Kopera's testimony; (3) Clay's testimony; and (4) testimony regarding DNA and serology as to bone fragments and blood found in Kulbicki's truck.

First, Kulbicki stated that Peele "testified extensively" about CBLA, which had since been "exposed as nothing more than a series of speculative and exaggerated claims." Relying on *Clemons v. State*, 392 Md. 339, 372, 896 A.2d 1059 (2006), a case in which the Court of Appeals held that the conclusory aspects of CBLA are not admissible under the Frye–Reed test,[8] Kulbicki argued that "the introduction of improper ballistics and firearms evidence in this case is sufficient to warrant reversal of conviction." Second, Kulbicki averred that Kopera committed perjury at the trial "when he testified that he had attended the University of Maryland and the Rochester Institute of Technology," and when he "falsified documents in order to conceal and protect his lies." Moreover, Kulbicki alleged that Kopera's

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[8] "*Frye–Reed* is the test in Maryland for determining whether expert testimony is admissible. The name is derived from two cases, *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), where this standard of general acceptance in the relevant scientific community was first articulated, and *Reed v. State*, 283 Md. 374, 391 A.2d 364 (1978), where we adopted the *Frye* standard." *Blackwell v. Wyeth*, 408 Md. 575, 578 n. 1, 971 A.2d 235 (2009).

testimony "was inconsistent with his own reports and bench notes." Third, Kulbicki argued that "Clay's identification should have been suppressed because it was unreliable and it was based on improperly suggestive procedures." Fourth, Kulbicki challenged the validity of the DNA and serology testing that was performed. In addition to those four main contentions, Kulbicki argued that trial counsel's failure to preserve issues for appeal constituted ineffective assistance of counsel.

At the postconviction hearing, Kulbicki presented the testimony and affidavits of experts in the fields of metallurgy, chemistry, firearms and ballistics, visual science, and molecular biology. William Tobin, a former metallurgist for the FBI, testified that Peele had no scientific basis for his testimony linking bullet fragments to one another on the basis of their elemental composition. According to Tobin, Peele's testimony that the bullet fragments recovered from the autopsy and Kulbicki's truck were "analytically indistinguishable" was "not an accurate statement." Instead, Tobin opined that the bullet fragments' arsenic contents differed, and therefore should have been "declared analytically distinguishable or dissimilar."

Kulbicki next presented evidence, and the State stipulated, that Kopera had lied about his credentials at the trial.[9] The evidence demonstrated that Kopera

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[9]Kopera could not be examined with regard to
(continued...)

did not earn degrees in engineering, as he alleged, and had never been accepted to the University of Maryland or Rochester Institute of Technology. Rather, the University of Maryland transcript in Kopera's personnel file was a forgery.

To further discredit Kopera's testimony, Kulbicki presented the testimony of John Nixon, who was accepted as an expert in firearms and ballistics. Nixon testified that, contrary to Kopera's opinion, "you wouldn't be able to say" what caused the damage to the rubber stripping on Kulbicki's truck window. In addition, Nixon noted that Kulbicki's handgun had a right-hand twist while the bullet fragment recovered during the autopsy had a left-hand twist. Moreover, using Kopera's measurements of the markings on the bullet fragment and Kulbicki's weapon, Nixon concluded that Kulbicki's handgun "did not fire that bullet." Citing the FBI ballistics database, Nixon testified that the bullet fragment was most likely fired from a .32 caliber weapon. Nixon added that, using Kopera's measurements, the database did not contain a single match for a .38 caliber Smith & Wesson.

While Nixon was on the stand, Kulbicki introduced Kopera's bench notes into evidence. Contrary to Kopera's testimony that the bullet fragments from the autopsy and Kulbicki's truck came from a "large caliber" gun, Kopera's bench notes stated that the

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[9](...continued)
these issues, as he had committed suicide prior to the postconviction hearing.

caliber for the former was "medium" and that the latter "couldn't be determined." In addition, while Kopera testified that his caliber determination was based on the cannelures, his laboratory report stated that the cannelure marks had "no value for comparison purposes." Kopera's testimony that Kulbicki's handgun had been "in the cleaned condition" was also contradicted by his notes, which stated that the gun was "dirty" with "residue" in the barrel and cylinder.

Dr. Christopher Palenik, who was admitted as an expert in microscopy and chemistry, testified that Kopera improperly conducted the test that led to his conclusion that damage to Kulbicki's window was caused by a bullet fragment. Dr. Palenik explained that, by failing to apply hydrochloric acid, Kopera did not properly complete the test for the presence of lead. Kopera's claim that he did not use hydrochloric acid because the Maryland State Police protocols did not require its use in 1993 was contradicted by the text of the protocols.

Dr. Elizabeth Johnson, who was admitted as an expert in molecular biology and forensic DNA profiling, testified that the methodology used by the State's laboratory made it impossible to conclude that the DNA samples that were tested had been retrieved from Gina's body or from the bone fragments in the truck. Dr. Johnson opined that the bone fragments were improperly stored and handled, and the State's technicians failed to properly clean them prior to testing. As a result, Dr. Johnson believed that the State should have deemed the results "inconclusive."

During the postconviction hearing, Kulbicki called both of his trial counsel to testify, but neither could recall specific events from the trial or their preparation, and the case file no longer existed. Patricia Hall, the lead defense counsel in Kulbicki's 1995 trial, testified that she had originally sat in a second chair capacity as defense counsel in Kulbicki's 1993 trial. John Franke, a 1988 law school graduate, assisted Hall in the 1995 trial. Franke stated that he had previously handled other criminal jury trials, but none of them involved the charge of murder in the first degree. Franke testified that at the time of the trial, he was not "familiar with the practice of expert witnesses [preparing] bench notes in addition to their official report produced at trial."

The State presented testimony from one witness, Michael Thomas, a firearms identification examiner with the Baltimore County Police Department, who was accepted by the circuit court as an expert in firearms identification. Thomas "couldn't conclude an awful lot" from the bullet fragment recovered from the autopsy because it was "very mutilated and deformed." He was, however, able to say that "it didn't come from a small caliber firearm." In addition, Thomas could not rule out a .38 or .32 caliber weapon. With regard to the window stripping from Kulbicki's truck, Thomas testified that he tested the rubber-like strip using hydrochloric acid, and found that it tested positive for the presence of lead. On cross-examination, Thomas acknowledged that the FBI database did not list a .38 Smith & Wesson revolver as being capable of firing the bullet recovered during the autopsy. Thomas based this conclusion on a comparison of his own

measurements to the database. Thomas also testified that the bullet "might have a slight left twist."

By opinion and order dated January 2, 2008, the circuit court denied Kulbicki's petition for postconviction relief. With regard to the issues raised on appeal, the court ruled as follows:

> The Uniform Post-[C]onviction Procedure Act applies only to limited categories of error. Not all discoveries or developments after conviction that shed new light on the trial provide a basis for relief. Most significantly, the question of guilt or innocence is beyond the purview of post-conviction relief, as the proceedings do not serve as a substitute for appeal or a motion for a new trial.
>
> Of equal importance, claims of newly discovered evidence also provide no basis for post-conviction relief....
>
> Thus, in addressing the Petitioner's claims, this Court is limited to allegations of constitutional violations, ineffective assistance of counsel, and other matters clearly governed by the Uniform Post–Conviction Relief statute. Arguments of guilt or innocence, and concerns regarding newly discovered evidence and changes in science and technology within the intervening years are simply not a proper avenue for relief.

* * *

Plainly, Mr. Kopera committed perjury at trial. He testified to a degree and to credentials that were patently false....

It is equally clear that this perjury was unknown to the prosecution at the time of trial....

Under the current case law in Maryland, perjury that was not known to the prosecution at the time does not provide a basis for post-conviction relief. However, this Court believes that the Maryland appellate courts would likely follow the line of cases that find that knowledge of the falsity of a statement by a state law enforcement witness is, in effect, imputed to the State. Nevertheless, there must then be a showing [of] materiality of the falsity in order to warrant relief.

In analyzing the question of materiality, the issue is the likelihood that the truth would have produced a different outcome, not that knowledge that the witness was committing perjury would have impacted the outcome. This distinction is critical. Mr. Kopera's academic credentials were essentially meaningless. He was not conducting testing that required an academic degree. His professional training and experience qualified him as an expert, regardless of his academic pedigree.... There simply is no likelihood that the jury's determination would have been influenced by the fact that Mr. Kopera did not have the

academic credentials he claimed.

* * *

Petitioner's primary focus in this claim is the introduction of evidence of [CBLA] at trial. However the challenge to this evidence does not fit into any recognized category for post-conviction relief.

* * *

CBLA ... has actually not been adequately tested to demonstrate that conclusions drawn regarding the relatedness of batches of metal can support conclusions that specific fragments came from the same bullet or batches of bullets. The Court of Appeals reached essentially this conclusion in Clemons, supra. However the studies that shed light on these conclusions were not available at the time this case was tried. At the time of both the original trial [and] the re-trial, it was generally accepted in the relevant scientific community that CBLA was valid and reliable science.

There is nothing to suggest that the State presented expert testimony that it knew was not sound. Nor is there any evidence to suggest that defense counsel was ineffective at the time of trial by failing to anticipate this scientific development....

There simply is no basis under the

post-conviction laws that accords relief under these circumstances. Generally, such claims are handled ... through a Motion for a New Trial based upon newly discovered evidence ... Clearly the bullet analysis was central to the theory of the prosecution ... However this is not before the Court on a motion for new trial.

* * *

Petitioner's primary claim for ineffective assistance is based upon his argument that trial counsel essentially ceded the field of scientific evidence to the State....

[I]t is important to note that Ms. Hall was an experienced criminal defense attorney who served as second chair at the Petitioner's original trial, and then was lead counsel at the re-trial. Mr. Franke also was an experienced criminal defense attorney.

* * *

With CBLA, ineffective assistance is not a legitimate argument. The questions concerning the reliability of that science didn't even surface until long after Mr. Kulbicki's trial....

In looking at the balance of the scientific evidence, counsel was faced with a difficult strategic decision concerning the blood and bone analysis. While evidence at this post-conviction hearing demonstrates that one could have conducted more extensive cross-examination,

particularly in the DNA arena, there still is strong evidence that could be linked to the victim ... Defense counsel was faced with a strategic decision whether to challenge multiple independent links to Ms. Neuslein, or to challenge agency. Clearly counsel opted for the latter strategy. The defense essentially acknowledged in opening that the shooting occurred in Mr. Kulbicki's truck. The focus of their strategy was evidence of alibi, time of death, and that the truck and other items from the Kulbicki home were not in his exclusive control, suggesting others with access to those items had motive.'

These were strategic decisions. They were based upon the multiple areas of science that would likely establish a link between the truck and the death. These were reasoned decisions made by experienced counsel who had already seen this evidence play out once before at trial. While you might generate some question concerning a specific scientific link, the collective weight of all of those links would nevertheless be compelling. Counsel's approach was not ineffective.

(Footnotes and internal citations omitted).

Discussion

Kulbicki's argument is threefold. First, he alleges that the use of unreliable evidence, such as CBLA, is a violation of due process cognizable under the

Uniform Postconviction Procedure Act ("UPPA"). Second, Kulbicki avers that the State's use of "perjured, false, and misleading expert ballistics testimony" denied him his constitutional right to a fair trial. Third, Kulbicki argues that his trial counsel provided ineffective assistance.

In response, the State contends that Kulbicki's claim regarding the admission of CBLA evidence at his trial "[is] not cognizable" under UPPA and, "in any event, [is] unfounded." Next, the State argues that Kulbicki's perjury claim does not afford him a ground for postconviction relief, particularly because the prosecutor was unaware of the perjury. Finally, the State argues that Kulbicki "failed to meet his burden of establishing his claim that his trial counsel rendered ineffective assistance."

On appellate review of a decision by a postconviction court, we will not disturb the court's factual findings unless they are clearly erroneous. *Lopez v. State*, 205 Md.App. 141, 154, 43 A.3d 1125, 1132 (2012) (citing *Arrington v. State*, 411 Md. 524, 551, 983 A.2d 1071 (2009)). Although we review the court's factual determinations under the clearly erroneous standard, "we make an independent determination of relevant law and its application to the facts." *Arrington*, 411 Md. at 551, 983 A.2d 1071 (citation omitted). Based upon the relevant case law, we uphold the circuit court's ruling.

I. CBLA Evidence

The Uniform Postconviction Procedure Act "applies

to a person convicted in any court in the State who is ... confined under sentence of ... imprisonment." Md.Code (2001, 2008 Repl.Vol.), § 7–101 of the Criminal Procedure Act ("CP"). A convicted person may begin a proceeding under this title if he or she claims:

> (1) the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of the State;
>
> (2) the court lacked jurisdiction to impose the sentence;
>
> (3) the sentence exceeds the maximum allowed by law; or
>
> (4) the sentence is otherwise subject to collateral attack on a ground of alleged error that would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy.

CP § 7–102(a). In addition, CP § 7–102(b) requires that "the alleged error has not been previously and finally litigated or waived in the proceeding resulting in the conviction or in any other proceeding that the person has taken to secure relief from the person's conviction." "For each trial or sentence, a person may file only one petition for relief" under UPPA, and in cases where a sentence of death has not been imposed, an UPPA petition "may not be filed more than 10 years after the sentence was imposed." CP § 7–103.

In this case, it is undisputed that Kulbicki's CBLA argument satisfied the requirements of CP §§ 7–101, 7–102(b), and 7–103. He was convicted in the Circuit Court for Baltimore County, was sentenced to life in prison, and has filed one postconviction petition within 10 years after the sentence was imposed. Although Kulbicki's challenge regarding Kopera's perjury was waived,[10] the remainder of the alleged errors raised by Kulbicki in his petition have not been previously litigated or waived in the proceeding resulting in his conviction or in any other proceeding. Therefore, the question presently before this Court is whether "the sentence or judgment was imposed in violation of the Constitution of the United States or the Constitution or laws of the State," pursuant to CP § 7–102(a). Kulbicki argues that his conviction, which was based on inaccurate scientific evidence, namely CBLA, violated his due process rights.[11]

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[10] We shall further address this issue in Section II of our Discussion, below.

[11] In his reply brief, Kulbicki makes clear that his challenge to the State's use of CBLA evidence is "premised on the assertion that the introduction and reliance on that evidence rendered his trial so fundamentally unfair that it violated his right to due process." He rejects the State's contention that he seeks relief based upon newly discovered evidence. *See Douglas v. State*, 423 Md. 156, 175, 31 A.3d 250 (2011) ("claims of newly discovered evidence made pursuant to that statute are not cognizable under the UPPA").

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. "[A] part of the due process guarantee is that an individual not suffer punitive action as a result of an inaccurate scientific procedure." *Armstead v. State*, 342 Md. 38, 84, 673 A.2d 221 (1996) (citation omitted). Although scientific test results "need not be infallible" to meet this standard, the evidence must not be "so extremely unfair that its admission violates fundamental conceptions of justice." *Id.* (citing *Dowling v. United States*, 493 U.S. 342, 352–53, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)). "The Supreme Court has construed this test narrowly, as have the Maryland courts." *Id.* at 85, 673 A.2d 221 (citations omitted). According to the Court of Appeals, "the essence of the due process 'fundamental fairness' inquiry is whether there was a balanced, fully explored presentation of the evidence," which is dependent on "the jury's ability to weigh the evidence, and the defendant's opportunity to challenge the evidence." *Id.* at 87, 673 A.2d 221 (citing *Dowling*, 493 U.S. at 353, 110 S.Ct. 668). Stated differently, "[t]he Constitution ... protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Perry v. New Hampshire*, ___ U.S. ___, 132 S.Ct. 716, 723, 181 L.Ed.2d 694 (2012).

In *Clemons, supra*, 392 Md. at 371, 896 A.2d 1059, the Court of Appeals recognized that "a genuine

controversy exists within the relevant scientific community about the reliability and validity of CBLA." Therefore, it concluded that "CBLA does not satisfy the requirement under the *Frye–Reed* test for the admissibility of scientific expert testimony." *Id.* at 372, 896 A.2d 1059. The *Clemons* Court, however, did not determine whether admission of CBLA evidence in cases prior to 2006 constituted a violation of due process.[12] *Clemons* addressed an evidentiary issue

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[12] It is worth noting that, because the Court's conclusion in *Clemons* was evidentiary and not constitutional, Kulbicki would not be entitled to a new trial for the retrospective application of the *Clemons* ruling, *see State v. Greco*, 199 Md.App. 646, 660, 24 A.3d 135 (2011), *aff'd*, 427 Md. 477, 48 A.3d 816 (2012), even if his petition for post conviction was filed pursuant to CP § 7–106(c), which states:

> (1) This subsection applies after a decision on the merits of an allegation of error or after a proceeding in which an allegation of error may have been waived.
>
> (2) Notwithstanding any other provision of this title, an allegation of error may not be considered to have been finally litigated or waived under this title if a court whose decisions are binding on the lower courts of the State holds that:

(continued...)

and, thus, applied only prospectively to cases to be heard at the trial level. By contrast, the issue before us is whether we can retroactively rule that the use of CBLA evidence violated a defendant's constitutional right where the defendant was convicted on the basis of such "unreliable" scientific evidence. Because this issue has not been addressed by a court of this state, we look to other jurisdictions for guidance, and we adopt the holding of *United States v. Berry*, 624 F.3d 1031, 1039–43 (9th Cir.2010).

Before turning to the holding in *Berry*, we must briefly explain the state of CBLA evidence. The FBI commissioned the National Research Council ("NRC") to evaluate its use of CBLA and, following the Council's 2004 report,[13] discontinued its use of CBLA at trials. *Id.* at 1037. The NRC report demonstrates

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[12](...continued)

(i) the Constitution of the United States or the Maryland Constitution imposes on State criminal proceedings a procedural or substantive standard not previously recognized; and

(ii) the standard is intended to be applied retrospectively and would thereby affect the validity of the petitioner's conviction or sentence.

[13] The NRC's report is available for public download at the following url: http://www.nap.edu/catalog.php?record_id=10924

that the problem with CBLA is not that the *method* used to *compare* the contents of two bullets is unreliable in some abstract sense,[14] but that it is unreliable to conclude that a CBLA "match" supports *further specific factual assertions put forth at trial.* Most often, these assertions are that matching bullets came from the same box, the same manufacturer, were related in time or geography, or generally linked the defendant to the crime in some unspecified manner. Crucially, these conclusions rested on assumptions unsupported by scientific and statistical testing of the general bullet *manufacturing* process. *See* Nat'l Res. Council at 112–13. First, the NRC found that a CBLA match supports the inference that two bullets came from the same "source" when taken to mean a compositionally indistinguishable volume of lead ("CIVL"). But there was no generally reliable evidence that a CBLA match corresponded to a match among any other type of "source," such as a specific manufacturer, box, time, location, etc. *See id.* at 106–07. Thus, it remained in many cases a distinct possibility that while bullets from the same "source" match each other, they also match bullets from any number of " sources." Second, there was no general

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[14] CBLA evidence is, "in many cases, ... a reasonably accurate way of determining whether two bullets could have come from the same compositionally indistinguishable volume of lead. It may thus in appropriate cases provide additional evidence that ties a suspect to a crime, or in some cases evidence that tends to exonerate a suspect." Nat'l Res. Council, *supra*, at 109, 112.

knowledge of the probability that manufacturing variations would result in two different lead sources randomly producing matching bullets, producing what is known as a "false positive." *Id.* at 107 ("Although it has been demonstrated that there are a large number of different [CIVL's], there is evidence that bullets from different CIVL[']s can sometimes coincidentally be analytically indistinguishable.").

In *Berry*, the defendant was accused of perpetrating a series of robberies and terroristic attacks that employed, among other weapons, pipe bombs filled with "buckshot," which are lead pellets traditionally used in shotgun shells. 624 F.3d at 1033–34. When Berry and his accomplices were apprehended, federal agents found in their vehicle a number of firearms, grenades, and ammunition, as well as incriminating letters. *Id.* at 1034–35. Agents later discovered more incriminating evidence at the suspects' residences, including fuses of the kind used in the attacks, propane canisters identical to one found in a failed incendiary device at one of the crime scenes, anti–government propaganda, and miscellaneous clothes and weapons matching eyewitness and video evidence of the attacks. *Id.* at 1035.

The suspects were indicted and tried together in 1997, and the government used CBLA tests to compare buckshot used in one of the pipe bombs with buckshot found in Berry's auto shop. *Id.* at 1035–36. The *Berry* Court described the CBLA evidence, as follows:

> Kathleen Lundy, a forensic examiner formerly with the FBI, testified that the buckshot pellets

found at the two locations were chemically "indistinguishable," suggesting that both sets of buckshot came from the same source.

Additional evidence greatly strengthened the connection between Berry's buckshot and the buckshot recovered from the pipe bomb. To begin with, the label on the bag of buckshot found in Berry's shop indicated that it came from Hornaday Manufacturing Company. In her research, Lundy learned that Hornaday purchases its lead from a single supplier. Until 1996, that supplier had been Asarco. In early 1996, however, Hornaday had started purchasing lead exclusively from Doe Run. Because the chemical composition of the buckshot used in the Planned Parenthood bomb did not match the composition of either Asarco or Doe Run lead, Lundy believed that the buckshot had been created in 1996, during a time when Hornaday was using lead from both suppliers in its products.

Gregory Hanson, Director of Sales for Hornaday, confirmed much of Lundy's analysis. He testified that Hornaday had created a batch of 436 bags of buckshot from a mixture of Asarco and Doe Run lead in early 1996. In addition, Hanson testified that Hornaday was the only buckshot manufacturer who used bullets that were 3 percent antimony, a metal used to harden lead. Both the pipe-bomb buckshot and the buckshot in Berry's auto shop were 3 percent antimony, strongly suggesting

> that both came from the batch of buckshot that Hornaday manufactured in 1996. Of this batch, only thirty-two bags were shipped to the area of Spokane, Washington, and Coeur d'Alene, Idaho.
>
> The end result of the CABL evidence was compelling. Between Lundy's and Hanson's testimony, the government narrowed the likely source of the buckshot in the Planned Parenthood pipe bomb to thirty-two bags, two of which were in Berry's possession.

Id. at 1035–36.

On appeal from postconviction proceedings,[15] Berry argued that the CBLA evidence used at his trial was so arbitrary as to render his trial fundamentally unfair. *Id.* at 1040. The *Berry* Court explained that due process is violated only when the evidence is so arbitrary that the factfinder and the adversary system were not competent to uncover, recognize, and take due account of its shortcomings. *Id.* (citing *Barefoot v. Estelle*, 463 U.S. 880, 899, 103 S.Ct. 3383, 77 L.Ed.2d

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[15] Berry sought review under 28 U.S.C. § 2255, which provides a remedy in the sentencing court exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined. *Berry*, 624 F.3d at 1038.

1090 (1983)).[16] After reviewing the criticisms of CBLA explained above, the Ninth Circuit held:

> While the [CBLA] evidence introduced against Berry may have been flawed, we do not find it so arbitrary as to render Berry's trial "fundamentally unfair." The criticisms of [CBLA] evidence that Berry relies on indicate that it is precisely the kind of evidence that the adversary system is designed to test. Vigorous cross-examination would have exposed its flaws to the jury.[17]

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[16] As the *Berry* Court noted, *Barefoot* was superseded on other grounds by 28 U.S.C. § 2253(c)(2).

[17] The *Berry* Court held, in the alternative, that "even if [CBLA] evidence were generally unreliable, we would still be inclined to reject Berry's due process challenge based upon the reliability of the specific testimony in his case." 624 F.3d at 1041. In particular, the *Berry* Court held that "Lundy's testimony was not susceptible to any of the criticisms identified in the National Research Council report" because she "did not testify that the [CBLA] tests definitively linked Berry to the Planned Parenthood pipe bomb," and because her "determination that the pipe bomb buckshot was 3 percent antimony—a feature unique to Hornaday buckshot—linked Berry to the pipe bomb regardless of the [CBLA] tests." *Id.* at 1041–42.

(continued...)

Id.

We see no reason to depart from the holding in *Berry*, and it applies squarely to the present case.[18] The criticisms that Kulbicki now levels against the CBLA evidence in his trial are the same as those in *Berry*. And as in *Berry*, discrediting the CBLA evidence in this case did not require positive scientific proof of assertions contrary to those presented at trial. The

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[17](...continued)
We note, however, that the Ninth Circuit appears to have overlooked the possibility that the match was a "false positive."

[18] There is no reason to doubt Peele's conclusions that the bullet fragments (Q–1 and Q–2) match each other, and that the bullets recovered from Kulbicki's possession (Q4 to Q–9) match each other. And Peele was sufficiently doubtful of his conclusion that the fragments Q–1 and Q–2 came from the same box as bullet Q–6, which was in Kulbicki's possession. *See Berry*, 624 F.3d at 1041 ("Lundy did not testify that the [CBLA] tests definitively linked Berry to the Planned Parenthood pipe bomb."); *Commonwealth v. Kretchmar*, 971 A.2d 1249, 1257 (Pa.Super.Ct.2009) (no violation of due process where CBLA expert conveyed the possibility of a random match and expressed "a probability far less than certainty" that the bullets came from the same box). Peele was unequivocal, however, in his testimony that fragments Q–1 and Q–2 and bullet Q–6 were "made by the same manufacturer on or about the same time."

flawed assumptions in Kulbicki's case rested on nothing; Peele's testimony would have been fully discredited had those assumptions been recognized and their foundations tested. As in *Berry*, Kulbicki's criticisms of CBLA analysis "concern the proper weight of the evidence, not its admissibility. It can hardly be said, therefore, that the adversary system was not 'competent to uncover, recognize, and take due account of its shortcomings.'" *Id.* at 1042 (quoting *Barefoot*, 463 U.S. at 899, 103 S.Ct. 3383). Accordingly, we reject Kulbicki's due process claim.

II. Perjury and Alleged False Testimony

Next, Kulbicki argues that the State's use of Kopera's perjured testimony as well as Kopera's and Peele's "false and misleading" expert ballistics testimonies violated his right to a fair trial. Relying on *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), Kulbicki contends that "the State is charged with the knowing use of perjured testimony when any state agent testifies falsely even if the falsity is unknown to the prosecutor at the time of the testimony in question." In addition, Kulbicki avers that Kopera's conclusions—like Peele's—were "inaccurate, without scientific foundation, and inconsistent with his own reports and notes." Believing that both experts' testimonies were material to his conviction, Kulbicki urges us to reverse.

In response, the State argues that in Maryland, "[a]n 'allegation that perjured testimony was offered at trial, absent a showing that the State knowingly used perjured testimony, is not a ground for postconviction

relief.'" (Quoting *Gray v. State*, 388 Md. 366, 385, 879 A.2d 1064 (2005)) (internal quotation marks omitted). Alternatively, the State contends that, although Kopera committed perjury, Kulbicki was not denied a fair trial because Kopera's testimony was not material. Lastly, the State asserts that reversal is not warranted because at the time of Kulbicki's 1995 trial, "there was no indication that [Peele] questioned the validity of the matters he asserted or that his testimony was inaccurate or misleading."

At the outset, we note that Kulbicki waived any claims regarding Kopera's perjury. To the extent that comparing or examining Kopera's bench notes would have revealed variances with his trial testimony, and a background investigation would have revealed that Kopera lacked the claimed college degrees, Kulbicki could have raised his contentions on direct appeal. Thus, the postconviction court was not required to address this issue. '

Even if not waived, Kulbicki's argument still fails. Although we agree with Kulbicki that "the State is charged with the knowing use of perjured testimony when [a police officer] testifies falsely even if the falsity is unknown to the prosecutor at the time of the testimony," we decline to grant the relief he seeks. We explain. '

It is well-established that "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." *Miller v. Pate*, 386 U.S. 1, 7, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967) (citing *Mooney v. Holohan*, 294 U.S. 103, 55

S.Ct. 340, 79 L.Ed. 791 (1935)). Indeed, "a conviction obtained through use of false evidence, known to be such by *representatives of the State*, must fall under the Fourteenth Amendment." *Napue*, 360 U.S. at 269, 79 S.Ct. 1173 (emphasis added) (citations omitted). Citing *Gray, supra*, 388 Md. at 385, 879 A.2d 1064, the State would have us narrowly interpret the term "representatives of the State," to include only prosecutors and not law enforcement officers or experts. However, a review of the long line of cases regarding this topic leads us to conclude otherwise but does not help Kulbicki as to the bottom line.

When the *Napue* Court announced the rule at issue, it cited, among others, *Curran v. Delaware*, 259 F.2d 707 (3rd Cir.1958), where the United States Court of Appeals for the Third Circuit upheld the lower court's grant of habeas corpus relief. In *Curran*, the Court held that "the knowingly false testimony of [a detective assigned to the case] was sufficient to cause the defendants' trial to pass the line of tolerable imperfection and fall into the field of fundamental unfairness," despite the fact that "the prosecuting officer was in no way a party to or cognizant of the perjured testimony given by certain witnesses ... or of the fact that the law enforcement officers had taken steps to procure false testimony favorable to the prosecution." *Id.* at 713. As Kulbicki points out, the United States Court of Appeals for the Fifth Circuit reached the same conclusion in *Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir.1977), where it made clear that, "[i]f the state through its law enforcement agents suborns perjury for use at the trial, a constitutional due process claim would not be defeated merely

because the prosecuting attorney was not personally aware of this prosecutorial activity." (Citations omitted). *See also In re Investigation of the W. Va. State Police Crime Lab., Serology Div.*, 190 W.Va. 321, 438 S.E.2d 501, 505 (1993) ("[I]t matters not whether a prosecutor using [a State serologist] as his expert ever knew that [the expert] was falsifying the State's evidence. The State must bear the responsibility for the false evidence."). *Cf. Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

The authority cited by the State does not support its claim that knowledge by the prosecutor, rather than other state actors, is a necessary requirement for a due process claim based on false testimony. In *Gray*, the Court of Appeals denied postconviction relief after finding "no indication that ... the State knowingly used false testimony at trial." 388 Md. at 384–85, 879 A.2d 1064. In that case, however, it was a fact witness, Erika McCray, who recanted her testimony and not a state agent. *Id.* at 372–73, 879 A.2d 1064. More importantly, the *Gray* Court indicated that relief would have been warranted had "the officer who obtained McCray's testimony believed it to be false." *Id.* at 384–85, 879 A.2d 1064 (emphasis added). *See also Height v. Dir., Patuxent Inst.*, 209 Md. 647, 650, 120 A.2d 911 (1956) (indicating that perjury by an "arresting officer," if supported by facts, "would amount to the denial of due process"). Therefore, we

expressly extend the federal courts' rulings in *Curran* and *Schneider* to cases in Maryland.

In this case, it is undisputed that Kopera, an examiner with the Maryland State Police Firearms Unit, lied about his credentials at Kulbicki's trial. Because Kopera was a state official, Kulbicki has a valid constitutional claim recognizable under UPPA. Nonetheless, we agree with the postconviction court that Kulbicki's claim fails on the merits because "there must then be a showing [of] materiality of the falsity in order to warrant relief."

In *Stevenson v. State*, 299 Md. 297, 305, 473 A.2d 450 (1984), the Court of Appeals made clear that "the proper rule, which is clearly supportable, requires that an initial inquiry be made to determine if the testimony is material to the outcome of the case; if it is not, the due process clause does not automatically require a new trial."[19] In that case, Stevenson "was

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[19] In reaching its ruling, the *Stevenson* Court reviewed some of the Supreme Court cases upon which Kulbicki relies, including *Napue, supra; Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967); and *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). *Stevenson*, 299 Md. at 305–07, 473 A.2d 450 ("the knowing and intentional use of false testimony by the prosecution is a violation of due process providing such testimony is material to the result of the case."). The Court also cited several cases from Federal Courts of Appeals, *id.* at 307, 473 A.2d

(continued...)

charged with the first degree murder of her husband and related offenses including setting fire while perpetrating a crime." *Id.* at 299, 473 A.2d 450 (footnote omitted). Dennis Michaelson, one of the rebuttal witnesses called by the state to counter defense expert testimony as to the origin of the fire, "testified that he had graduated cum laude from the Illinois School of Technology, a fact which subsequently proved to be untrue." *Id.* at 300, 473 A.2d 450. On appeal, the Court affirmed the denial of Stevenson's motion for a new trial, concluding that Michaelson's false testimony "was not material to the outcome of the case." *Id.* at 308, 473 A.2d 450.

Here, Kulbicki proved that Kopera presented false testimony as to his credentials. We agree with the postconviction court that "there simply is no likelihood that the jury's determination would have been influenced by the fact that Mr. Kopera did not have the academic credentials he claimed." As the State notes in its brief, the record reflected that "ballistics is a field for which no college degree is offered, and the expertise for the field is usually based on experience, which

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[19](...continued)
450 ("new trials are required only when there is a knowing and intentional use of false evidence that is material") (citations omitted), as well as other due process cases with different factual contexts, *id.* at 308, 473 A.2d 450 ("materiality must be shown before a new trial is warranted") (citations omitted), and reached the same conclusion.

Kopera had in copious amounts."[20]

In his reply brief, Kulbicki cites cases from other jurisdictions in which "courts found that an expert's perjury regarding his credentials constitutes sufficient grounds upon which to reverse a conviction." Those cases, however, are distinguishable. *See United States v. Jones*, 84 F.Supp.2d 124 (D.D.C.1999) (expert's false qualifications, to which defense counsel stipulated in defendant's second trial, was deemed material where the first trial ended in a hung jury and the only difference in the second trial was the expert testimony); *State v. DeFronzo*, 59 Ohio Misc. 113, 394 N.E.2d 1027 (Ohio Ct.Com.Pl.1978) (falsification of credentials was deemed material where expert had neither the academic background nor experience he claimed).[21] Although Kulbicki correctly cites *Napue*,

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[20] Because, ultimately, Kopera's testimony as to some of his credentials was not material, Kulbicki's trial counsel's failure to investigate Kopera's credentials does not amount to ineffective assistance.

[21] Kulbicki also cites *State v. Elder*, 199 Kan. 607, 433 P.2d 462 (1967), but that opinion is inapposite. In *Elder*, the Supreme Court of Kansas did not employ the test we use in this case to determine whether an expert's perjured testimony was *material to the case before it*. Instead, the defendant, Lyle Elder, was on trial for *perjury* for having falsified his educational background while testifying as an expert in a *previous trial*. *Id.* at 463. The *Elder* Court

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360 U.S. at 269, 79 S.Ct. 1173, in stating that "[t]he principle that the State may not knowingly use false evidence ... does not cease to apply merely because the false testimony goes only to the credibility of the witness," he fails to acknowledge that credibility is not based on credentials alone. *See* Maryland Criminal Pattern Jury Instructions 3:14 (advising jurors that although the expert's "experience, training and skills, as well as the expert's knowledge of the subject matter" should be considered, they are "not required to accept any expert's opinion" and, rather, are free to "give expert testimony the weight and value [they] believe it should have").[22]

Citing *Stevenson*, 299 Md. at 308, 473 A.2d 450, Kulbicki urges us to consider the materiality of Kopera's entire testimony.[23] The portion of the

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[21](...continued)
therefore applied a much less stringent test for materiality than ours, to wit: "The false statements relied upon, however, need not bear directly on the ultimate issue to be determined; *it is sufficient that they relate to collateral matters upon which evidence would have been admissible.*" *Id.* (emphasis added) (citations omitted).

[22] The Pattern Jury Instruction was given in this case.

[23] In particular, Kulbicki argues that Kopera was the only witness to testify that the damage in the truck was caused by a bullet fragment and that the
(continued...)

Stevenson Court's opinion on which Kulbicki relies, however, is dicta [24]

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[23](...continued)
revolver had been "cleaned." Kulbicki also contends that Kopera "was one of only two witnesses who ... linked Kulbicki to the murder with bullets."

[24] In its written opinion, the *Stevenson* Court held that the knowing and intentional use of *false testimony* violates due process when *such testimony* is material to the result of the case. *Stevenson*, 299 Md. at 305, 473 A.2d 450. The Court went on to address Stevenson's reliance on *People v. Cornille*, 95 Ill.2d 497, 69 Ill.Dec. 945, 448 N.E.2d 857 (1983), a case in which the State of Illinois had used testimony from the same expert as in *Stevenson*, and the Supreme Court of Illinois reversed the conviction when it came to light that the expert, "Michaelson," had lied about his academic credentials. *Stevenson*, 299 Md. at 308, 473 A.2d 450. In distinguishing *Cornille* from *Stevenson*, the Court addressed the *entirety* of the expert's testimony, rather than only the *false testimony* stated in the rule, above. The court stated:

> In *Cornille*, it appears that the testimony as to the cause of the fire was evenly balanced, justifying the court's conclusion that Michaelson's testimony, plus his impressive academic background, was likely to have persuaded the factfinder of the

(continued...)

Therefore, we need not engage in a similar analysis here.

As to Kulbicki's claims regarding the falsity of

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[24](...continued)
defendant's guilt. On the other hand, in the case *sub judice*, the trial judge found evidence of appellant's guilt was overwhelming, even if Michaelson's testimony was not in the case, and he made this observation "beyond a reasonable doubt." Our review of the record confirms this observation. *Id.*

However, there is nothing in this portion of *Stevenson* that expands the scope of the rule announced above, *id.* at 305, 473 A.2d 450, and it is entirely *consistent* with a rule limited to *false testimony*. (If the evidence in *Stevenson* was "overwhelming" without *any* of Michaelson's testimony, then it must be sufficient after subtracting only his *perjured* testimony.) We therefore would not presume that Kulbicki's proffered interpretation of *Stevenson* is anything more than dicta. Moreover, Kulbicki has not presented a case in which a defendant's conviction was reversed as a result of the admission of false testimony from Kopera, specifically, as Stevenson had done with regard to Michaelson. For these reasons, we need not, and shall not, apply Kulbicki's proposed interpretation of *Stevenson*, which would have us consider the sufficiency of the evidence *without any testimony* from Kopera.

Peele's CBLA testimony, we agree with the State that "there was no indication that [Peele] questioned the validity of the matters he asserted or that his testimony was inaccurate or misleading." *See Brown v. State*, 225 Md. 610, 616, 171 A.2d 456 (1961) (describing perjury as "'swearing falsely and corruptly, *without probable cause of belief* '") (quoting *Wharton*, Criminal Law, § 1511 (12th ed.1932), p. 1782) (emphasis added). Likewise, without the benefit of hearing testimony from Kopera himself during the postconviction proceeding, we cannot assume that his trial testimony regarding the gun's "cleaned" condition and the significance of "cannelures" did not reflect his beliefs at the time of trial. Any evidence presented by Kulbicki showing otherwise was merely circumstantial and speculative. Finally, as Peele was not a state official and Kulbicki provided no evidence to show that any prosecutors knew about the unreliable nature of CBLA at the time of trial, Kulbicki's contention "comes down to the claim that his conviction was the result of false testimony," which "goes to credibility and so to the sufficiency of the evidence, a matter not available for post conviction relief." *Husk v. Warden, Md. Penitentiary*, 240 Md. 353, 356, 214 A.2d 139 (1965) (citing *Davis v. Warden*, 235 Md. 637, 201 A.2d 672 (1964)). *See also Berry*, 624 F.3d at 1043 (concluding that the NRC Report is no more than impeaching evidence of CBLA evidence introduced at trial, especially where the expert "was not accused of fabricating the results of any tests in this case, and there is no evidence that she committed perjury").

III. Ineffective Assistance of Counsel

Kulbicki's final claim is that his trial counsel

rendered ineffective assistance. According to Kulbicki, his attorneys should have consulted with scientific experts to investigate and challenge the State's ballistics and DNA evidence, and his attorneys should have objected to "the State's improper argument that Kulbicki's consultation with an attorney was evidence of guilt." In response, the State contends that Kulbicki failed to meet his burden of establishing ineffective assistance as to both claims.

"'[T]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Walker v. State*, 161 Md.App. 253, 262, 868 A.2d 898 (2005) (quoting *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In order to prevail on an ineffective assistance claim, a defendant must satisfy the two-part test announced by the Supreme Court:

> First, the defendant must show that counsel's performance was deficient.... Second, the defendant must show that the deficient performance prejudiced the defense.... Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. 2052.

With respect to the first part of the *Strickland* test, "a court deciding an actual ineffectiveness claim must

judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 104 S.Ct. 2052. In that regard, all circumstances must be considered. *Id.* "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Id.* at 689, 104 S.Ct. 2052. Furthermore, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," as "[t]here are countless ways to provide effective assistance in any given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* (citation omitted). Therefore, in order to prevail, a defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)).

"Mere errors in trial tactics are not sufficient to constitute incompetency of counsel." *State v. Merchant*, 10 Md.App. 545, 551, 271 A.2d 752 (1970) (citations omitted). "Tactical decisions, when made by an authorized competent attorney, as well as legitimate procedural requirements, will normally bind a criminal defendant." *Curtis v. State*, 284 Md. 132, 150, 395 A.2d 464 (1978) (footnote omitted).

In this case, we cannot say that the postconviction court erred when it held that Kulbicki's trial counsel acted reasonably. Both trial counsel were experienced

criminal defense attorneys, and one of them had the highly relevant experience of serving as co-counsel at Kulbicki's *previous trial* on the same charges. As the trial court explained, Kulbicki's counsel faced a strategic choice: challenge multiple independent scientific links to the victim—only some of which would be damaged by Kulbicki's present arguments—or challenge agency. Kulbicki's present arguments give us no reason to reject the trial court's conclusion that counsel reasonably chose to pursue the latter strategy, particularly where one of them had seen the evidence "play out once before at trial." None of the cases that appellant cites involved such a strategic choice or the knowledge gained from a previous trial. *See Gersten v. Senkowski*, 426 F.3d 588, 609 (2d Cir.2005) ("[I]t is clear that in this case such a failure was not justified as an objectively reasonable strategic choice. Here, no facts known to defense counsel at the time that he adopted a trial strategy that involved conceding the medical evidence could justify that concession."); *Sims v. Livesay*, 970 F.2d 1575, 1580–81 (6th Cir.1992) ("We discern no strategy in [counsel]'s failure to investigate the role of the [evidence at issue], only negligence."); *Bowers v. State*, 320 Md. 416, 578 A.2d 734 (1990). And while we agree that the State's closing argument was improper,[25] we again cannot say that counsel's

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[25] The prosecution stated, in closing, that Kulbicki's decision to consult with an attorney and hire a private investigator "is a sign of a guilty man." This appears contrary to Maryland law, *Hunter v. State*, 82 Md.App. 679, 686, 573 A.2d 85 (1990) ("[I]t is

(continued...)

actions were anything other than a strategic decision not to call further attention to what it considered a damaging piece of evidence. In light of the particular facts of this case, we have no reason to disturb the trial court's ruling that Kulbicki's counsel acted reasonably. As Kulbicki failed to satisfy the first prong of the *Strickland* test, we need not consider the second prong. 466 U.S. at 697, 104 S.Ct. 2052 ("there is no reason for a court *453 deciding an ineffective assistance claim to ... address both components of the inquiry if the defendant makes an insufficient showing on one").

For all of the foregoing reasons, we affirm the trial court's judgment.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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[25](...continued)
impermissible for the State to offer evidence of, or comment upon, a criminal defendant's obtention of counsel or his attempt, request, or desire to obtain counsel in order to show a consciousness of guilt."), but is not the proper subject of postconviction relief, where the only question is whether *defense counsel reacted strategically* to the State's closing.

STATE OF MARYLAND *IN THE CIRCUIT COURT

VS. *FOR BALTIMORE COUNTY

JAMES ALLEN KULBICKI*

*CASE NO. 03 K93 000530

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JUDGMENT ORDER

For the reasons set forth in the Memorandum Opinion dated January 2, 2008, it is hereby ORDERED this 2nd day of January, 2008, that the Petition of James Allen Kulbicki for Post-Conviction Relief is DENIED.

1/2/08
Date

Kathleen Gallogly Cox
Judge

STATE OF MARYLAND *IN THE CIRCUIT COURT

VS. *FOR BALTIMORE COUNTY

JAMES ALLEN KULBICKI*

*CASE NO. 03 K93 000530

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OPINION

This matter came before the Court for hearing on Petitioner's Amended Petition for Post-Conviction Relief on April 18th through April 25, 2007. The Court has considered the Amended Petition and the State's Response, together with the exhibits that were introduced. In addition, the Court has read the transcript of the trial proceedings. The Court has also considered the post-hearing briefs and arguments in ruling on the merits of this Petition.

I. Procedural Background

The Petitioner, James Kulbicki, was indicted for first degree murder on February 8, 1993, arising out of the shooting death of Ms. Gina Nueslein. The Petitioner was convicted by a jury before the Honorable John Grason Turnbull on October 20, 1993. On January 26, 1994, the Petitioner was sentenced to life without the possibility of parole.

Kulbicki's conviction was appealed to the Court of Special Appeals, which reversed and remanded for a new trial on December 1, 1994. The case was tried

again. November 13th through November 22, 1995 before the Honorable Barbara Kerr Howe. Following a second conviction, Kulbicki was again sentenced to life without the possibility of parole. On March 22, 1996 a three-judge panel declined to modify that sentence. Thereafter, the conviction and sentence were affirmed by the Court of Special Appeals on January 31, 1997, and certiorari was denied on April 14, 1997.

An initial pro se Petition for Post-Conviction Relief was filed on March 17, 1997. At the Petitioner's request, the hearing on that Petition was postponed. This matter remained dormant until November 2, 2004, when an Amended Petition for Post Conviction Relief was filed, which the State answered. A Second Amended Pro Se Petition was later filed on July 6, 2005, and then supplemented on March 31, 2006. The State filed a consolidated Answer on October 3, 2006.

II. Summary of 1995 Trial Proceedings

In order to assess the theories advanced in the Petition, they must be viewed in the context of the trial record. The State's evidence against Kulbicici can be classified into three categories: (1) evidence concerning Kulbicki's relationship with the victim and motive; (2) crime scene evidence and investigation, and; (3) scientific evidence used to link Kulbicki to the crime scene. The defense presented alibi evidence, to corroborate Kulbicki's denial that he committed the murder, together with expert testimony.

While not evidence, the openings and closings are

significant, as they highlight strategic decisions that were made by the prosecution and the defense. From the outset, both sides focused the jurors on the scientific evidence to be presented. In openings, the state outlined the serology, DNA, and ballistics evidence that it claimed would link to Kulbicki's black Ford truck. In outlining the State's case, the prosecutor forecast, "And I would be surprised if there's any evidence at all to suggest to you that this is not the crime scene, that this truck is not where Gina was murdered. This was where we found the evidence." (Tr. Vol. II, p.43).

The defense didn't refute this assessment in its opening. As counsel stated: "Now, you've seen all of these great charts and everything, and I'm gonna tell you right now that, yeah, I do think that's probably Gina's blood there and a lot of it. Hey, there's no denying it. It's Gina's blood. But you look at all these great charts they've shown you. There's one real important item missing out of all of them. Look at this, ladies and gentlemen. You don't see a picture of my client sitting in that seat, in that driver's seat." (Tr., Vol. II, p. 57). The defense stressed the alibi it would present, and emphasized that Kulbicki, as an experienced police officer, would not be so dumb as to murder the victim in his own truck and leave a blood stained jacket in his own room. (Id. at p.61).

A. Kulbicki's Relationship to Gina Neuslein

Gina Neuslein's body was found around 7:45 a.m. on January 10, 1993 at Gunpowder State Park. The police learned early in their investigation that Kulbicki

was involved in an extra-marital relationship with Ms. Neuslein. Testimony from various Neuslein family members established that the relationship began around September 2000, when Ms. Neuslein was nineteen. They stopped seeing each other in approximately April 1991 when Ms. Neuslein was four months pregnant. At Ms. Neuslein's initiation, the relationship resumed around May 1992. Family members testified that Kulbicki would visit Ms. Neuslein at their home or at the Royal Farm Store where she worked, although they could remember only one occasion where they went out socially.

Ms. Neuslein's son Michael was born in the fall of 1991, and Ms. Neuslein initiated paternity proceedings in May 1992. Relatives testified that Ms. Neuslein became pregnant again in October 1992, and her sister mentioned in Kulbicki's presence that they should be more careful. Ms. Neuslein terminated that pregnancy Ms. Neuslein initiated paternity proceedings against Kulbicki, who initially denied any responsibility for the child. Sondra Crain, a city paternity prosecutor, described Kulbicici as the most difficult person she'd dealt with in twelve years. She recalled Kulbicki adamantly denied paternity, insisting he'd never had sex with Ms. Neuslein and barely knew her. After initial testing, Kulbicki insisted on a second blood test. Both demonstrated over a 99% probability that Kulbicki was Michael's father. The case was due to return to court on January 13, 1993, at which time the State intended to seek a lump sum payment towards support arrearages.

On January 8, 1993, the day before Ms. Neuslein

died, a co-worker recalled she saw her arrive in a dark pick-up. Ms. Neuslein had a mark on her right cheek that looked like an imprint of three fingers, and seemed upset.

Shortly before her death, Ms. Neuslein started to see Andy Staib, who also worked for the police department. He picked Ms. Neuslein up from the Royal Farm Store on January 8, 1993, the evening before her death. When they were leaving the lot, she pointed to a black Ford truck and said, "There's Jimmy." After that, her demeanor changed and she seemed nervous. Staib accompanied Ms. Neuslein back to her parents' home. Family members recalled that Kulbicki's black truck was seen outside the home that evening. The engine revved and the truck sped off. When this was reported to Ms. Neuslein, she appeared frightened.

Ms. Neuslein left to walk to work abound 3:30 p.m. on January 9, 1993, but never arrived. Her mother became fearful and called the police around 11:30 p.m. The family, learned of Ms. Neuslein's death from police the next afternoon.

B. Crime Scene Evidence

Department of Natural Resources and Baltimore County Police officers testified concerning the discovery of Ms. Neuslein's body at Gunpowder State Park. Evidence clearly demonstrated that she was killed in another location, and dragged from the edge of the parking lot to the location where she was found. No bullet fragments or significant trace evidence were

developed at the crime scene.

The médical examiner, Dr. James Locke, testified that the cause of death was a contact gunshot wound to the head, and the manner was homicide. The trajectory of the bullet blew out a. hole from the front through the back of the skull, and a bullet fragment was removed from the skull during the autopsy. Dr. Locke testified that determination of time of death was an inexact science, particularly where the body is left in the cold. However he agreed that death could have occurred at 4:00 or 5:00 p.m. on January 9, 1993, or even later into the early evening hours.

Barbara Clay was in Gunpowder State Park with her son on January 9, 1993, just before closing. As she was driving out near dusk, she saw a black Ford pick-up enter the parking lot area. She thought it was a park ranger, but realized she was mistaken when she made eye contact with the driver. She later learned of the discovery of the body in the park. She then contacted the police to describe what she had seen. A couple of days later she saw a news report of Kulbicki's arrest and realized he was the person she had seen in the park. She again contacted the police. At trial she was unequivocal in her identification of Kulbicki as the person she saw in the park on January 9, 1993

The police investigation focused early on Kulbicki as a possible suspect. He was interviewed in his home around 3:00 p.m. the day the body was found. Kulbicki stated that he and the victim were friends, but he denied having had sex with her. He also said it was

impossible that he was the father of Ms. Neuslein's son. Pursuant to a warrant, Kulbicki's home was searched, and his truck was impounded. Various items, including a blood stained jacket, an off duty service revolver, and ammunition were seized from the home.

C. Scientific Evidence

The State introduced fairly extensive scientific evidence in an effort to link Kulbicki to the crime scene. This evidence fell into three categories: (1) ballistics and bullet analysis; (2) serology; and (3) DNA and bone analysis.

1. Ballistics and Bullet Analysis

Ernest Peele, a retired FBI forensic scientist, testified concerning comparative bullet lead analysis ("CBLA"). Neither his credentials nor the underlying reliability of this science were challenged. Essentially, Peele stated he analyzed bullet fragments to determine trace elemental and alloy composition to make comparisons for sameness or differences among bullets.

Peele examined bullet fragments rec6vered from Ms. Neuslein at autopsy and from Kulbicki's truck. Peele also examined bullets recovered from Kulbicki's handgun at home. Based upon the bullet composition, he determined the fragment from Ms. Neuslein's autopsy was analytically indistinguishable from that recovered from Kulbicki's truck. He found those were also unusually close to the composition of some bullets

taken from Kulbicki's home. Therefore he testified he would expect some association between these bullet groups.

On cross examination, Peele indicated that even within the same box of bullets, there would be differences in composition, and that you often see two different groups with similar composition. In this instance, the similarities he found between the autopsy and truck fragments and the other bullets would be consistent with coming from the same manufacturer. However he also noted that the same type of ammunition will produce similar results.

Firearms examiner Patrick Kamberger testified concerning the processing of Kulbicki's truck. Although the exterior was dirty, the front interior was clean and smelled of cleaning solution. The area beneath the driver's side floor mat was wet, and two mats were missing. The vehicle was vacuumed for trace, but little volume was recovered. Possible bone fragment from that trace was sent to the Smithsonian. Pieces of bone fragment were found inside the truck, along with a small lead fragment. Blood stain evidence was collected from areas beneath the seat belt covers and the rear bench. An area of damage to the molding near the passenger window was also photographed and processed.

Joseph Kopera testified as a ballistics and firearms examiner. Among his credentials, he claimed to possess a BA and an engineering degree. Mr. Kopera examined the bullet fragments from the autopsy and the truck. He opined that the cannelure from the

fragment from the truck was consistent with having been fired from a .38 caliber or larger gun. He testified there were insufficient markings on the fragment to identify whether it was fired from a particular gun. On cross examination, Kopera acknowledged he could not say the fragments from the autopsy and truck were connected to Kulbicki's gun.

Mr. Kopera indicated the damage to the molding and underlying rubber strip from the window area of the truck was consistent with bullet damage. He testified that testing verified the presence of lead, consistent with a bullet having been fired in that area. He acknowledged that he couldn't say conclusively that the lead came from a bullet.

2. Serology

Mark Abbott testified as an expert in serology from the Maryland State Police lab. Abbott compared blood stains from the truck and a jacket seized from Kulbicki's home to known samples from Ms. Neuslein and Kulbicki. Abbott concluded the samples from the driver's side door and the floor mat were blood, but he was unable to make further comparison. Samples from the seat belt area, the rear bench seat area, and the rear floor mat were human blood consistent with Ms. Neuslein's type, and not Kulbicki's type. The blood stain on the jacket seized from Kulbicki's home was also human blood consistent with Ms. Neuslein's type.

3. DNA and Bone Analysis

Linda Watson testified concerning DNA analysis.

Ms. Watson conducted RFLP analysis utilizing four to five probes. Watson tested the blood sample from the jean jacket from Kulbicki's home and found a 99.9% probability match to Ms. Neuslein. She further testified that the frequency such a match was 1 to 7 million in the Caucasian population and 1 to 45 million in the African American population.

Karen Quandt, a molecular biologist from Cellmark Laboratories, also conducted RFLP DNA analysis on the bone chips and fragments recovered. Quandt testified that the DNA pattern obtained from RFLP testing of ground up bone contained at least four bands that matched with four of the seven bands in Ms. Neuslein's blood. Quandt was unable to visualize the other bands due to degradation in the bone sample, and she acknowledged that an entire DNA banding sample would be required to "call it a match." Quandt testified that the patterns she obtained excluded Kulbicki as the source.

Quandt also conducted PCR DNA testing on three smaller bone chips. She looked at six genetic markers, and concluded that Ms. Neuslein could not be excluded as a source. The frequency of that comparison was determined a 1 in 640 in the Caucasian population, 1 in 8400 in the African American population and 1 in 2500 in the Hispanic population.

Dr. Douglas Owsley, a forensic anthropologist from the Smithsonian Institute, also testified concerning examination of bone fragments that were recovered. They evidenced soot from carbon deposit, and staining. Dr. Owsley opined the testing showed the fragment

was consistent with a portion of a flat bone, such as a cranium, with evidence of damage caused by a gunshot wound at close range. He acknowledged that he was unable to state that the bone fragment was from the victim.

4. Other Evidence Relating to Expert Analysis

The parties entered into a stipulation that Kulbicici was colorblind. It was also stipulated that his off duty revolver that was seized was a .38 caliber weapon.

D. Defense Evidence

1. Alibi Evidence

The defense presented alibi testimony through a series of witnesses and exhibits, and through Kulbicki's own testimony.

Kulbicki was assigned to a permanent midnight shift, so he typically returned home in the morning, slept for a portion of the day, then went to work in the evening. When Kulbicki got off work on January 8, 1993, he testified he took Ms. Neuslein to work at Royal Farms. He acknowledged that Ms. Neuslein was upset by a discussion about visitation, as he claimed he expressed a desire to have their child visit in his home. Kulbiki stated he last saw Ms. Neuslein around 11:30 or 11:45 a.m. on January 8, 1993.

Kulbicki testified he returned home and worked around the house. After his wife got off from work, he testified that they went to his mother-in-law's home

around 7:00 p.m. to celebrate her birthday and stayed until around 9:30 p.m. Kulbicki testified that he and his wife and son traveled in their car, and that his truck was home. Although his stepson was at the birthday celebration, he left shortly after Kulbicki arrived.

Kulbicki's wife and eleven year old son corroborated that they went to the party that evening. Mrs. Kulbicki recalled they were at the celebration between approximately 9:00 and 11:00 p.m. and Allen Kulbicki was uncertain of the time.

Kulbicki worked the night of January 8th, and returned home the next morning to sleep and then run errands. Kulbicki stated he left home in his truck in the afternoon and made numerous stops, then returned home and went to the Hechinger's and the mall with his wife and son. Testimony was presented from an investigator that it would take approximately thirty-six minutes to travel the route Kulbicici took, and then another seven minutes to return home. Kulbicki's house was 35 minutes and 18 miles from the Gunpowder Park, and that park was approximately 28 minutes and 14 miles from the Royal Farm store where Ms. Neuslein worked.

Joseph La Paglia, a shoe repairman, corroborated that Kulbicki came to his store around 2:45 p.m. on January 9 1993. Roxanne Buck testified Kulbicki stopped at the cleaner's between 3:00 and 3:15. David and Danny Mosley both testified that Kulbicki stopped at a remodeling site somewhere between 3:00 and 4:00 p.m., and that he stayed about a half hour. Michael

Dimenna placed him in his hardware store for approximately twenty minutes at some point between 3:15 and 4:00 p.m. on January 9, 1993.

Kulbicki was questioned about his relationship with Ms. Neuslein and the paternity and support proceedings. He denied that he told police that he hardly knew Ms. Neuslein, or that he told the detectives he had never had sex with her. He stated he told his wife about the affair, and denied that he tried to hide the paternity suit from her, although those papers were sent to a post office box rather than his home. Kulbicki explained he didn't want to believe Michael was his son, so he insisted on the paternity testing.

Mrs. Kulbicki testified that she first learned of her husband's affair in 1990, and that she was hurt and angry. Her husband told her the relationship stopped, so she was very angry when she saw the paternity papers in 1992. She acknowledged she previously claimed that her husband denied an affair, and that she believed him.

2. Defense Expert Testimony

The defense presented testimony from an entomologist, Robert Dickenson Hall. He found that marks on the victim's body were consistent with insect activity in areas of exposed skin. Dr. Hall said it was unlikely that would have occurred while the body was in the park, given the cold temperatures.

Nicholas Forbes also testified as an expert in

forensic pathology. He agreed that the puncture marks on the backs of the victim's legs were consistent with animal activity, and those would be unusual in the park at that time of year. Dr. Forbes also testified that time of death could be highly variable, and that a gunshot wound at close range would typically produce a fair amount of blood.

Finally, prior testimony of Hasson Stewart was read to the jury, as Mr. Stewart was hospitalized and unable to attend trial. Mr. Stewart testified that he was at the Gunpowder Park to watch for deer with his daughter on a Sunday, which he believed was January 10, 1993. He estimated he was in the area between 6:30 and 9:00 a.m., when he saw a man come out of the woods and head to a black Ford truck. Mr. Stewart described that the man gave them a funny look, and he felt that something was wrong.

Mr. Stewart later heard of the discovery of the body and the arrest of the person from the park. When he saw Kulbicki's face on television following his arrest, he was sure that was not the same person he had seen in the park, and he felt the police might have the wrong person. Although he testified that he told his employer about this impression, he did not contact police until October 21, 1993, after the first trial and conviction occurred.

III. Summary of Evidence at Post-Conviction Hearing

At the post-conviction hearing, Petitioner outlined that its four primary claims for relief related to errors

stemming from the admission of CBLA evidence, the testimony of Kopera, taint affecting the testimony of Barbara Clay, and unreliability in the serology and DNA analysis. Other issues were raised in the pleadings, but review of those is based primarily on review of the transcript of the trial proceedings.

A. CBLA Analysis

The Petitioner presented testimony from William Tobin, a metallurgist and firearms examiner. Mr. Tobin had a twenty-seven year career with the FBI. During his time at the FBI, CBLA was a routine forensic service done within the metallurgy unit, although it was not an analysis that Mr. Tobin performed. In 1995, when the analysis was done for this case, the FBI lab was actually the only place where CBLA could be obtained as a routine service.

CBLA is based upon three premises: (1) that the composition of small samples of lead from bullets is representative of the composite source; (2) that there is homogeneity in the trace composition within the sample; and (3) that there is uniqueness for the composition of the source. After leaving the FBI, Mr. Tobin did an analysis of the CBLA process to determine if it was scientifically reliable. Mr. Tobin testified that all three of the premises for the analysis were proven to be unreliable. The largest reason is that testing demonstrated the chance of coincidental matches. In essence he found that if the trace composition of two bullet fragments is found to be indistinguishable, there is no scientific data to support the conclusion that they came from the same source or

that they were manufactured in the same batch of bullets.

In addition to his testimony concerning the unreliability of CBLA, Mr. Tobin excepted to a portion of Agent Peele's trial testimony. Specifically, Agent Peele's trial testimony that Q1 and Q2 were "extremely close" was, in his opinion, a meaningless comparison. Mr. Tobin noted that the arsenic level in those two samples was different, and he believed there was no basis to conclude they were derived from the same source.

B. Analysis of Kopera's Trial Testimony

Petitioner presented Dr. Cliff Palenek as an expert in microscopy and chemistry to review trace particle analysis. Dr. Palenek focused on Kopera's sodium rhodizonate testing to detect lead trace on the rubber strip from the truck. Dr. Palenek testified that he found Kopera's bench notes to be lacking, as they did not fully describe the testing process. He also noted that the testing process is done in two steps, and that a positive reaction for lead in the first step should be followed by a more specific second test to rule out false positives that may be obtained by reaction to trace amounts of barium, tin, or strontium. As noted on cross, at least two of those other elements are also present in trace amounts in bullets.

Dr. Palenek opined that without bench notes to indicate the second phase of the test process was done, you could not positively state that lead trace was on the strip. Even if there was lead trace, Dr. Palenek

took issue with Kopera's conclusion that a bullet fragment had punctured the strip. Dr. Palenek did not view or conduct an independent analysis of the strip.

John Nixon was presented as an expert in firearms and ballistics. Mr. Nixon reviewed Kopera's trial testimony, the more recent ballistics re-analysis done for the State by Michael Thomas.

Mr. Nixon disagreed with Kopera's conclusion that the bullet fragment analysis shows that it could have been fired by a .38 caliber Smith & Wesson. Mr. Nixon's measurement of the lands and grooves did not vary significantly from that of the other experts. However the cannelure on the fragment demonstrated, in his opinion, a left twist. The Smith & Wesson weapon has a right twist. Therefore Mr. Nixon would rule out any .38 caliber Smith & Wesson as a firearm used to expel this fragment. Mr. Nixon acknowledged that the fragment was distorted on impact. He also acknowledged that the flattened condition affects measurements to some extent. Although he believed that a .32 caliber weapon was the most likely source, he could not rule out .38 caliber weapons generally. However he maintained steadfastly that the cannelure showed twist that would rule out a Smith & Wesson such as that owned by Kulbicki.

Mr. Nixon also viewed the rubber strip damage. In his opinion, he was unable to say what caused the damage, although he agreed that he could not rule out a bullet as the source of the damage.

Michael Thomas also testified as a firearms expert

from the Maryland State Police laboratories. At the State's request, Mr. Thomas conducted a re-examination of the ballistics and firearm information. He was not given Kopera's analysis prior to his review. However he did listen to the testimony presented by Mr. Nixon as the Petitioner's expert.

Fragment QI, which was the bullet fragment recovered at the autopsy, was mutilated, and Mr. Thomas was unable to determine whether it was fired by any of the three weapons he examined. He was able to state that the fragment came from a bullet that was of fair size, and that it was cleanly fired. Given the makings, he opined that he could not rule out the .38 caliber weapons that were seized from Kulbicki as a source of firing. Mr. Thomas acknowledged that he also could not rule out that it was fired by a .32. Mr. Thomas disagreed with Mr. Nixon's opinion that the .38 Smith & Wesson should be ruled out. In his view, the deformation to the fragment, and the effect of torque on impact, made the observations of twist unreliable. He also disagreed that the cannelure observations would rule out the Smith & Wesson .38 caliber weapon. Overall, he opined that the Q1 from autopsy was fired by a fireann that was not a small caliber weapon. He could not rule out, nor could he rule in any of the three firearms that were seized from Kulbicki. Mr. Thomas reviewed Mr. Kopera's trial testimony and stated that he did not disagree with any of Mr. Kopera's findings or opinions.

On cross-examination, Mr. Tomas stated that the fragment in this case was very deformed. He was able to obtain a land and groove measurement which he ran

through an FBI database to find a list of weapons that might fit. He agreed that no Smith & Wesson .38 came up on the database list as a possible match. Mr. Thomas also acknowledged that the bullet appears to have a slight left twist, which was not reflected in his bench notes. He also did not discuss the possible impact of torque in his written report. Mr. Thomas stated that he looked into the effects of torque after hearing Mr. Nixon testify. He found two studies from a literature search that talk about the impact of torque, one of which describes it as a rarely observed event. Nevertheless Mr. Thomas stated he has seen the effect demonstrated, and he has seen it in evidence. Mr. Thomas agreed that if a fragment shows left twist, it can't come from a right twist handgun. Additionally, if the fragment is so distorted that the twist is unreliable, then other measurements of lands and grooves may be so distorted as to be of no real value to an examiner.

Mr. Thomas also testified about a re-test he conducted of the rubber strip for the truck, which included both steps of the sodium rhodizonate methodology. His test again confirmed the presence of lead on that strip. In his opinion, a projectile caused the damage to the strip, but he could not state to a certainty that it was a bullet fragment.

C. Barbara Clay's Identification Testimony

Barbara Clay testified at the Post-Conviction proceedings, and did not waiver in any significant respect from her trial or pre-trial testimony. Ms. Clay recalled seeing a black truck come into the parking

area at Gunpowder State Park at closing time. She stated her window was down and she saw the full face of the driver. She stated she said hello to the driver, but he did not respond. After she left the parking area, she spent about twenty minutes looking for deer, and did not observe the person leave.

Ms. Clay called 911 after she heard that a body was found in the park because she thought her information might be significant. She called again when she heard that the police had a suspect, and was told they thought there would be an arrest. She acknowledged a vague recollection of seeing a news report when Kulbicki was arrested, and she recalled seeing him on the news in handcuffs.

Ms. Clay did not waiver in her identification. She testified that she felt she stepped up as a citizen when she went to the police and testified at trial. After trial the victim's family expressed their appreciation for her help, and she became close to the family.

D. DNA Analysis

The Petitioner presented Dr. Elizabeth Johnson as an expert in DNA testing. Dr. Johnson reviewed the Cellmark testing and the testimony from Karen Quandt.

Dr. Johnson noted that the bone fragments that were tested were very small, and would pose a challenge to obtain a sufficient quantity of DNA for testing. She also noted concerns over the risks for contamination of the sample, and the conditions for

storage of the samples.

Bone would be crushed in the early stages of the DNA extraction process. Obviously if the sample is contaminated, Dr. Johnson noted that the contaminated product would be part of the mixture. The Cellmark lab notes don't contain any information about cleaning the samples. The three small fragments from the vacuum trace materials were combined into one sample in the extraction process. A separate extraction was done on the large bone fragment.

The sample from the large fragment was then quantified and compared to known samples from the victim. Dr. Johnson described the results as extremely weak. She believed you could see only partial consistency in three bands on the autorads. In her opinion, you could not exclude the victim as the DNA source, but you also couldn't positively include her.

Dr. Johnson critiqued Ms. Quandt's trial testimony on this analysis. In her view, it was inappropriate to opine that there was a match in the bands. She also believed you could see only three bands, not four as Ms. Quant testified. She also disagreed that you could conclude that this was DNA from the bone, as opposed to exogenous DNA, as there was no way to determine if the bone was properly cleaned. She also criticized the Cellmark protocol that allowed for a finding of partial matches. Overall, Dr. Johnson testified concerning serious reservations about the validity of the testing, particularly since the bones were not cleaned before testing.

Dr. Johnson stated that Cellmark was one of the larger private labs doing DNA testing when this was done. Dr. Johnson stressed concerns about the potential for contamination on cross. She acknowledged that she had no evidence that such contamination did occur. She acknowledged that there is a faint band on the radiograph that she discounted as an artifact.

Dr. Johnson did not take issue with the opinion that the victim could not be excluded as the source. In her view, she couldn't not be identified or excluded. She expressed concern that there were inconsistent results on the quantification of the bone fragment sample, and that the radiograph banding pattern is light, which means there is little DNA present. Additionally, this analysis was done in an era when, in her view, people were not as careful about risks of contamination.

Petitioner also called Lynda Watson to testify about her analysis and testimony at the 1995 trial proceedings. In effect, Ms. Watson was subjected to extensive cross-examination, in contrast to the approach taken at the original trial.

In 1993, Ms. Watson was employed as a forensic chemist at the Maryland State Police lab, where she performed DNA testing on blood stains in the Kulbicki matter. She conducted RFLP testing, which was the primary methodology in use at that time. Ms. Watson tested blood stains from the jean jacket seized from Mr. Kulbicki's home, and blood stains from the interior of the truck. Ms. Watson acknowledged that RFLP

testing is less discriminating than the STR tests more commonly in use at present.

Ms. Watson was cross-examined extensively on the limitations of the RFLP testing done in this case. She noted that she reviewed autorads and also had them sized by a computer program. At the time, it was the practice in the Maryland State Police labs to test at five points, but in the testing done in this case, only four areas were suitable for comparison. Bands with particularly long fragment lengths were not suitable for comparison, so they were not used. Thus only four probes were considered in the comparisons done.

Ms. Watson obtained cuttings from the jacket and car seat, and compared them to known blood standards from the victim and Mr. Kulbicki. She testified to the difficulties in extracting DNA from these samples, which required her to redo the process. She also acknowledged that some bands were extremely faint on the autorads, and that you can't rely simply on computer analysis of the bands, as they sometimes interpret an artifact on a film as a band. At trial, however, she presented a graphic that she testified was representative of the comparison she found on the film.

Ms. Watson re-examined the original autorads. At the conclusion of her testimony, Ms. Watson stated she believed her original analysis was good science, and was reflective of procedures in place at the time. She noted that the State Police testing protocols were developed from those in use at the FBI at that time. Ms. Watson did not retract any finding or significant

testimony from the original trial.

E. Testimony from Trial Counsel

Pat Hall served as second chair at Kulbicki's first trial, and was lead counsel at the re-trial in 1995. Ms. Hall was unable to locate any files concerning this representation, and testified solely from her memory of the proceedings.

Ms. Hall could not recall if they considered employing a CBLA or DNA expert, and she also could not recall whether they did any independent firearms or ballistics analysis. Ms. Hall was unaware of any concerns at the time about CBLA analysis, and she was aware of the solid reputation of the FBI laboratory. She did recall consulting with an entomologist and a medical examiner.

Ms. Hall could not specifically recall what information they had concerning the Kopera analysis. She did not recall if she saw his bench notes.

Ms. Hall did recall that this was her first real DNA trial experience. She testified that she called Cellmark Laboratories, and spoke to Dr. Watson. She could not recall what specific information they discussed. Ms. Hall also talked to other attorneys concerning the DNA analysis. She was aware of Cellmark's reputation in the DNA field.

Ms. Hall also vaguely recalled that she tried to speak to Barbara Clay prior to trial. She believed that Ms. Clay was uncooperative in these interview

attempts.

John Franke served as co-counsel with Ms. Hall at the re-trial. He also had no files from his representation, and testified solely from his memory of the 1995 proceedings. He noted that Kulbicki never expressed any dissatisfaction with his representation.

Mr. Franke did not recall handling prior matters with CBLA analysis. He had some vague recollection of gathering information about experts, particularly relating to entomology. Mr. Franke stated he was aware of Mr. Kopera's reputation in the ballistics and firearms field, and that he assumed he did not investigate his educational background. Mr. Franke could not recall whether he saw Kopera's bullet worksheets in preparing for trial.

Mr. Franke generally recalled that he felt somewhat rushed during the defense portion of the trial, as Judge Howe was adamant that they were going to conclude the testimony prior to Thanksgiving.

F. Other Post-Conviction Testimony

Dr. Mary Anne Johnson testified as an ophthalmologist with special expertise in the field of color deficiencies. Dr. Johnson tested Kulbicki, and determined he is a complete protanope, as he lacks the pigment associated with red cones. As a result, he sees colors, but has difficulty distinguishing red from green or white. Dr. Johnson stated that Kulbicki would see a blood stain on a jacket as a stain, but that the color would not be distinguishable to him as a red.

Dr. Loche testified concerning the practice in the Medical Examiner's office for transporting blood samples in silver tubes. In this instance, there- were three tubes, two with red tops and one with a purple top.

IV. Legal Analysis

Petitioner has raised numerous claims in support of his petition for postconviction relief. These fall primarily into four broad categories: (1) knowing use of perjured testimony; (2) use of unreliable or unsupported scientific evidence; (3) ineffective assistance of counsel; and (4) failure to disclose exculpatory evidence. There are other allegations, less significant in nature, that are encompassed in the Petition and post hearing briefs. In some instances, evidence presented is subject to challenge under more than one of these categories. However in addressing the merits of the Petition, it is important to articulate the precise nature of the claim as it relates to specific evidence, as different analytical standards apply.

A. Scope of Post-Conviction Relief

The Uniform Post-conviction Procedure Act applies only to limited categories of error. See Maryland Criminal Procedure Art., §7-101 et. seq. Not all discoveries or developments after conviction that shed new light on the trial provide a basis for relief. Most significantly, the question of guilt or innocence is beyond the purview of postconviction relief, as the proceedings do not serve as a substitute for appeal or a motion for new trial. See, Turner v. Penitentiary,

220 Md. 669 (1960); Daniels v. Warden, 223 Md. 631 (1960); Diggs v. Warden, 221-Md. 624 (1960).[1]

Of equal importance, claims of newly discovered evidence also provide no basis for post-conviction relief. See, State v. Tull, 240 Md. 49 (1965); Daniels v. Warden, supra. Claims of this nature are governed by

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[1] On September 11, 2007, several months following the conclusion of the evidentiary hearing in this matter, the State submitted a Supplement to Post Conviction Hearing Memorandum which included the results of new DNA testing on bone fragments recovered from Petitioner's truck that purportedly demonstrate the fragments were from the deceased, Gina Neuslein. While arguing that actual guilt or innocence is not relevant, the State nevertheless offers this report in an effort to rebut the argument of actual innocence.

The material contained in the State's Supplement is not timely, nor is it properly before this Court. Had the State wished to address this issue in some fashion, it had ample time to do so while these proceedings were pending. No reason is proffered for the delay. Nor was there any request to re-open these proceedings. This Court cannot consider a conclusory report provided long after the close of evidence, and without any opportunity for the Petitioner to review, challenge, or cross-examine on its contents. This Supplement was clearly inappropriate, and will not be considered.

Maryland Rule 4-331, which requires generally that they be filed within one year after sentencing or the issuance of a mandate on appeal, whichever is later.[2] However such motions can be filed at any time if based on DNA 'testing or other accepted scientific technique, the results of which, if proven would demonstrate actual innocence.

Thus, in addressing the Petitioner's claims, this Court is limited to allegations of constitutional violations, ineffective assistance of counsel, and other matters clearly governed by the Uniform Post-Conviction Relief statute. Arguments of guilt or innocence, and concerns regarding newly discovered evidence and changes in science and technology within the intervening years are simply not a proper avenue for relief.

B. Knowing Use of Perjured Testimony

Petitioner argues that a Due Process violation occurs, giving to a claim for postconviction relief, when the State knowingly utilizes false evidence to obtain a conviction. Further, the Petitioner argues that the prosecutor's knowledge of the falsity is not critical to this claim. While sometimes correct, this analysis is nevertheless imprecise.

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[2] This time limitation does not apply in death penalty cases if the newly discovered evidence, if proven, would show innocence of the crime or of an aggravating factor that made the case death eligible.

Clearly the knowing use of false or perjured testimony by a prosecutor gives rise to a claim of a Due Process violation that is cognizable on a petition for post-conviction relief. See, Miller v. Pate, 386 U.S. 1 (1967); Napue v. Illinois, 360 U. S. 264, 269 (1959); State v. D'Onofrio, 221 Md. 20 29 (1959). As stated in Napue, supra, "[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." (citations omitted).

When the prosecutor is unaware of the perjury, the claim of a Due Process violation becomes extremely tenuous, as there is no knowing or intentional violation of rights or abuse of the trial process. As stated in D'Onofrio, the mere fact that a witness recants is not sufficient to establish a basis for relief. As stated: "We have repeatedly held that a contention that a conviction was based on perjured testimony may not be raised on habeas corpus, in the absence of allegations that a state officer had a part in procuring the testimony or, at the time of trial, knew it to be perjured." State v. D'Onofrio, supra at 29. See also, Meadows v. Warden, 232 Md. 635 (1963); DeVaughn v. Warden, 241 Md. 411 (1966); Mann v. Warden, 238 Md. 623 (1965).

Although Maryland appellate courts have not yet had occasion to address an instance where perjury is committed by a law enforcement officer, courts in other jurisdictions have recognized a violation of Due Process

in that circumstance, regardless of the knowledge of the prosecuting attorney. See, e.g., Schneider v. Estelle, 552 F.2d 593, 595 (5th Cir. 1977); Smith v. Florida, 410 F.2d 1349, 1351 (5th Cir. 1969), and cases cited therein. The key to the rationale underlying these decisions is the notion that police officers investigating a crime are, in effect, members of the "prosecution team" Simth v. Florida, supra. Thus perjury by them, whether or not it is known at the time by the prosecuting attorney, is essentially treated as a knowing violation. In essence, the knowledge of the law enforcement witness is imputed to the prosecutor.

This line of cases, however, does not require that post-conviction relief be granted whenever there is perjured trial testimony by a law enforcement officer. Rather, it requires further analysis of the relevance and potential impact of that testimony in order to determine if relief is warranted. As stated by the Fifth Circuit, the test of materiality is whether it is "reasonably likely that the truth would have produced a different verdict." United States v. Antone, 603 F.2d 566, 570 (5th Cir. 1979); cf. Ohio v. DeFronzo, 394 N.E.2d 1027 (Ohio 1978); In the Matter of Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 190 W.Va. 321 (S.Ct.W.Va. 1993).

The Petitioner has argued that several instances of "perjured" testimony occurred at his re-trial. Included in this category are the testimony of Mr. Kopera and Mr. Peele regarding ballistics and CBLA. Specifically, Petitioner cites to the following testimony from Mr.

Peele:

- Testimony that bullet fragments from autopsy and in the truck were "analytically indistiuguishable"

- Testimony that unfired cartridges seized from Kopera's home could be "associated" with the bullet fragments;

- Testimony that the analytical differences between the unfired cartridges and the fragments "were not very large"

With respect to Mr. Kopera, the Petitioner stresses the following:

- Testimony concerning his educational background and degrees;

- Opinion testimony that the bullet fragment was fired from a weapon not less that .38 caliber in size;

- Opinion testimony that a bullet fragment caused the damage to the plastic piece in the truck.

The mere fact that the Petitioner disputes the accuracy of a statement does not make it "perjured." See, Burley v. Warden, 220 Md. 670 (1959), cert. denied, 362 U.S. 905 (1960); Davis v. Warden, 235 Md. 637 (1964); Walker v. Warden 1 Md. App. 108 (1967). Thus it is important to distinguish what is "perjured,"

i.e. statements made by the witness which he knew to be false when made, from statements of opinions that are disputed by other witnesses.

Plainly, Mr. Kopera committed perjury at trial. He testified to a degree and to credentials that were patently false. Not only did he testify about those matters at this trial, it is clear that he did so at numerous trials over the course of a career that appeared without blemish until the truth of his credentials came to light through the investigation initiated by Petitioner's counsel in this case.

It is equally clear that this perjury was unknown to the prosecution at the time of trial. In fact, it Was unknown when the Post-Conviction petition was filed, and only came to light during the course of these proceedings.

Under the current case law in Maryland, perjury that was not known to the prosecution at the time does not provide a basis for post-conviction relief. However, this Court believes that the Maryland appellate courts would likely follow the line of cases that find that knowledge of the falsity of a statement by a state law enforcement witness is, in effect, imputed to the State. Nevertheless, there must then be a showing a materiality of the falsity in order to warrant relief.

In analyzing the question of the materiality, the issue is the likelihood that the truth would have produced a different outcome, not that knowledge that the witness was committing perjury would have impacted the outcome. This distinction is critical. Mr.

Kopera's academic credentials were essentially meaningless. He was not conducting testing that required an academic degree. His professional training and experience qualified him as an expert, regardless of his academic pedigree. Even now there is no challenge that he had the requisite training, knowledge and experience to be recognized as an expert. There simply is no reasonable likelihood that the jury's determination would have been influenced by the fact that Mr. Kopera did not have the academic credentials he claimed.

The other statements relied upon by the Petitioner do not, in this Court's judgment, fall into the same category and are not properly characterized as "perjury." Petitioner challenges Mr. 'Peele's statement that the bullet fragments were "analytically indistinguishable," (Vol. IV, p. 151) through expert testimony demonstrating the difference in the arsenic levels in the two fragment samples. This distinction was pointed out on cross-examination by defense counsel and was appropriately explored at trial. (Vol. IV, p. 156-157). The same is true with respect to Mr. Peele's opinion concerning the degree of similarity between the unfired cartridges and the fragments. (Vol. IV, p.155-157; 159-160; 171-173). The differences in measurements between the samples was fully explored on cross-examination. Ultimately, Agent Peele acknowledged that he could not state that the seized bullets came from the same box as the fragment. He could only state that one of them was "so close that, certainly, that could have been in the same box." When pressed if he was sure of that, he acknowledged, "No, sir, I'm not sure of that." Id.

Although Petitioner has presented an expert to refute the reliability of CBLA and to take issue with these specifics of Mr. Peele's testimony even under the science as it existed at the time, this does not establish "perjury." To the extent that some of the analytical data did not fully support Mr. Peele's opinions, those gaps were appropriately raised on cross-examination.

The same analysis applies concerning other areas of Kopera's testimony. Not only are the areas of focus matters of opinion where reasonable minds could differ, the State has produced a second analysis and expert who has stated his analysis does not produce significantly different results or opinions from that of Kopera. Thus Kopera's "perjury" is limited to the area of credentials, which were not material. Therefore, this does not pose a basis for post-conviction relief.

C. Use of Unreliable or Unsupported Scientific Evidence

Petitioner's primary focus in this claim is the introduction of evidence of Comparative Bullet Lead Analysis ("CBLA") at trial. However the challenge to this evidence does not fit into any recognized category for post-conviction relief.

In Clemons v. State, 392 Md. 339 (2006), the Court of Appeals reviewed the history of CBLA in detail in a case on direct appeal. At trial, Clemons' counsel challenged the admissibility of the CBLA evidence, and presented William Tobin who testified to the "seriously flawed" theories underlying the analysis, essentially mirroring evidence presented in this post-conviction

hearing. On appeal, the Court of Appeals found that recent scientific study has generated a "genuine controversy" within the relevant scientific community concerning the reliability and validity of CBLA. Therefore, the Court held that the trial court erred in admitting the evidence, as it does not meet the Frye-Reed test requiring general acceptance of the methodology within the scientific community. See also, State v. Behn, 868 A.2d 329 (N.J.App. 2005).

The State presented an affidavit from Diane Wright of the FBI Laboratories that reviewed and interpreted in some detail the recent studies of CBLA and essentially concluded that the underlying science remains sound. However in late December, the State submitted an additional communication it had received from the FBI laboratories suggesting that the affidavit was confusing and should not be used in any further cases. The degree to which the FBI Laboratories continue to defend the underpinning of CBLA is muddied, at best.

The testimony in Court was persuasive in demonstrating that CBLA, which was long assumed to reliable, has actually not been adequately tested to demonstrate that conclusions drawn regarding the relatedness of batches of metal can support conclusions that specific fragments came from the same bullet or batches of bullets. The Court of Appeals reached essentially this conclusion in Clemons, supra. However the studies that shed light on these conclusions were not available at the time this case was tried. At the time of both the original trial ant the re-trial, it was generally accepted in the relevant

scientific community that CBLA was valid and reliable science.

There is nothing to suggest that the State presented expert testimony that it knew was not sound. Nor is 'there any evidence to suggest that defense counsel was ineffective at the time of trial by failing to anticipate this scientific development. The testing that was introduced was conducted by the FBI Laboratory, which has a solid reputation. There were no outside labs that routinely provided CBLA as a service. There simply is no evidence to suggest that the CBLA evidence wasn't valid or admissible at the time of trial, or that counsel should have anticipated the developments that occurred in this area of science over the ensuing decade.

There simply is no basis under the post-conviction laws that accords relief under these circumstances. Generally, such claims are handled under through a Motion for New Trial based upon newly discovered evidence. If a timely Motion for New Trial had been filed with the evidence now available, it is likely that the Petitioner would have been entitled to relief. Clearly the bullet analysis was central to the theory of the prosecution. While this was a strong circumstantial case, the ability to link the bullets from autopsy and from the truck to bullets associated with the Petitioner was a powerful piece of evidence. The recent developments that undermine the reliability of CBLA evidence are problematic. They are not a basis for post-conviction relief under any theory recognized in Maryland. To the extent that counsel have cited cases in other jurisdictions where new trials have been

granted, they have been done under statutes that provide a ground for relief based upon newly discovered evidence. See, e.g., State v. Behn, 868 A.2d 329 (N.J.Super. 2005); Commonwealth v. Lykus, 20 Mass. L. Rptr. 598, 2005 WL 3804726 (Mass. Super. 2005). However this is not before the Court on a motion for new trial. Further, the limited exception under Maryland Rule 4-331 for scientific evidence only entitles a Petitioner to relief if the evidence, if believed, would establish actual innocence. That exception does not apply to this evidence, and also does not afford a basis for relief.

D. **Ineffective Assistance of Counsel**

It is well established that ineffective assistance of counsel is an appropriate basis for post conviction relief. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Maryland v. Colvin, 314 Md. 1, 548 A.2d 506 (1988). The U.S. Supreme Court in Strickland stated that, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. To assist the trier of fact in determining whether counsel's acts or omissions have sunk to this standard, the Court in Strickland articulated a two-part test. The Strickland test was clarified by the Maryland Court of Appeals in Bowers v. State, 320 Md. 416, 578 A.2d 734 (1990). The first prong may simply be stated as whether counsel's performance was deficient. Bowers, 320 Md. at 424. In considering this performance element, the

Court must determine whether the attorney's performance falls below an objectively reasonable standard as measured against prevailing professional norms. Id. The second prong of the test is satisfied if it can be shown that counsel's deficient performance created an actual prejudice to the defense. *Id*. at 425.

The Bowers Court recognized the near impossibility of meeting this high standard and, reasoning that the U.S. Supreme Court did not intend the practical removal of a Petitioner's right to challenge ineffective assistance of counsel, modified this prong. Id. As a result, the second prong of the test, as applied in Maryland, is whether counsel's deficient performance produced a substantial possibility of prejudice to the defense. Id. at 426-27.

Petitioner's primary claim for ineffective assistance is based upon his argument that trial counsel essentially ceded the field of scientific evidence to the State. Petitioner's focus at the hearing was to present experts to challenge or refute the expert opinions offered by the State at trial. Petitioner argues the approach to science at trial was not a strategic decision, as trial counsel failed to investigate, and never understood, much less challenged, essential scientific evidence.

The testimony of trial counsel provides little insight on this point. This murder occurred nearly fifteen years ago, and neither counsel possesses any files pertaining to their representation. Their recollection of details of that representation were extremely hazy. However it is important to note that Ms. Hall was an

experienced criminal defense attorney who served as second chair at the Petitioner's original trial, and then was lead counsel at the re-trial. Mr. Franke also was an experienced criminal defense attorney.

The Petition argues ineffective assistance, based upon the following specific
lapses:

- Failure to look at bench notes and other evidence to properly analyze expert opinion, and failure to consult independent experts;

- Failure to refute the argument that the bloody jacket was left in the closet because Mr. Kulbicki was color blind, which claim was not scientific;

- Failure overall to understand and challenge the scientific testimony presented at trial;

- Failure to develop a proper defense strategy based upon inadequate investigation.

With CBLA, ineffective assistance is not a legitimate argument. The questions concerning the reliability of that science didn't even surface until long after Mr. Kulbicki's trial. The reputation for reliability of the FBI laboratories, which performed the analysis in this case, was well known and there is no evidence in this record to demonstrate they could have been effectively challenged at trial. And the undisputed evidence was that no private laboratories routinely performed this service at that time. Thus counsel was

faced with the unquestioned expert in this field, which was generally accepted as competent evidence at the time of trial. That expert was appropriately cross-examined. Counsel cannot reasonably be faulted concerning their approach to CBLA evidence at the time of trial.

In looking at the balance of the scientific evidence, counsel was faced with a difficult strategic decision concerning the blood and bone analysis. While evidence at this post-conviction hearing demonstrates that one could have conducted more extensive cross-examination, particularly in the DNA arena, there still is strong evidence that could be linked to the victim. There was blood in Kulbicki's truck, and bits of bone. There also was a bullet fragment. And there were competent opinions linking the DNA to Ms. Neuslein. Defense counsel was faced with a strategic decision whether to challenge multiple independent links to Ms. Neuslein, or to challenge agency. Clearly counsel opted for the latter strategy. The defense essentially acknowledged in opening that the shooting occurred in Mr. Kulbicki's truck. The focus of their strategy was evidence of alibi, time of death, and that the truck and other items from the Kulbicki home were not in his exclusive control, suggesting others with access to those items had motive.

These were strategic decisions. They were based upon the multiple areas of science that would likely establish a link between the truck and the death. These were reasoned decisions made by experienced counsel who had already seen this evidence play out once before at trial. While you might generate some

question concerning a specific scientific link, the collective weight of all of those links would nevertheless be compelling. Counsel's approach was not ineffective.

E. Failure to Disclose Exculpatory Evidence.

Petitioner argues that there were Brady violations, in that the State failed to disclose the following:

- The summary of table of Peele's evidence;
- Evidence that Q1 and Q2 were analytically distinguishable;
- Kopera's bench notes;
- Cellmark bench notes and autorads;
- Serology bench notes;
- The extent of contamination of bone fragments; and
- Other lab reports

As stated in State v. Tichnell, 306 Md. 428, 460(1986):

> The analysis begins with the rule in Brady v. Maryland, 373 U.S.83, 87, 83 S.Ct. 1194, 1196 [10 L.Ed.2d 215] (1963), that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process

where the evidence is material either to guilt or to punishment ....' In United States v. Agurs, supra, the Supreme Court set forth three situations in which the Brady rule usually arises: (1) when the state's case includes perjured testimony and the state knew or should have know the perjury; (2) where there is a request for specific evidence which is withheld or suppressed, id. 96 S.Ct. at 2397-2398, and (3) where there is a general request or no request for exculpatory materials. Id., 96 S.Ct. at 2399. In the first two situations, a conviction must be set aside if perjured or withheld evidence might have affected the outcome of the trial. Id., 96 S.Ct. at 2398. In the third situation, the conviction must be set aside if the withheld evidence creates a reasonable doubt that did not otherwise exist. Id. 96 S.Ct. at 2402.

The Court goes on to say:

> we note that in United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Supreme Court adopted a more flexible standard in determining when a defendant is prejudiced by the prosecution's failure to disclose exculpatory evidence. The Court held that in cases where the defendant requests either "general" or "specific" exculpatory evidence, due process is violated if nondisclosure of the information "undermines confidence" in the trial process.

The standard for relief based upon an allegation of a Brady violation in Maryland is well established. Evidence is considered material, and relief is therefore appropriate, "If there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 325 Md. 160, 190 (1992).

There is a dearth of evidence that any Brady violation occurred. With regard to the Peele opinions, and the arsenic levels in the Q1 and Q2 samples, those areas were explored on Cross-examination, so it would seem that evidence was disclosed. With regard to bench notes from the State's experts, counsel had no recollection whether or not they reviewed those records. Finally, with respect to "evidence" of contamination, while the defense argues strenuously that contamination could have occurred in the collection or in testing at the laboratories, there was no evidence in these proceedings that it did, in fact, occur. The current defense theory cannot simply be re-cast as fact and alleged as a Brady violation.

Petitioner has not demonstrated any suppression of favorable evidence by the State, not has it demonstrated how the theoretical suppression affected the outcome, given the strategic decisions previously discussed. For these reasons, Petitioner is not entitled to post-conviction relief on the basis of this claim.

F. Other Allegations of Error

1. Barbara Clay Identification

The remaining post-conviction theory on which evidence was presented at the hearing pertains to the identification testimony of Barbara Clay. Petitioner argues her testimony should have been suppressed at trial, as it was tainted by her exposure to television film footage following Mr. Kulbicki's arrest. Alternatively, Petitioner argues there was no indicia of reliability of the identification testimony, and that counsel was ineffective in their approach to this issue.

The record plainly demonstrates that counsel vigorously objected to the introduction of the identification testimony pretrial, preserving this issue for trial and appeal. It has been fully and finally litigated.

Even if this Court were to reach the merits of the issue, the mere fact that Mrs. Clay inadvertently saw a video clip of Mr. Kulbicici's arrest does not give rise to grounds to suppress her identification testimony. There was no showing that the procedure employed was impermissibly suggestive. And to the extent that there was some opportunity for suggestibility occasioned by the video footage, it was not caused by the State. See, Neil v. Biggers, 409 U.S. 188 (1972); Barrows v. State, 59 Md. App. 169, cert. denied, 301 Md. 41(1984); Loud v. State, 63 Md. App. 702, cert. denied, 304 Md. 299 (1985). Petitioner argues that the officers, in effect, should have anticipated that footage of the arrest might be shown and therefore should have cautioned Mrs. Clay to avoid watching television. This impermissibly stretches the limits of what the

officer should anticipate.

Having had an opportunity to observe Mrs. Clay testify, there was no showing if an impermissibly suggestive process or a substantial danger of misidentification. The witness had a full opportunity to view the alleged perpetrator at the park, she demonstrated a high degree of awareness and attention to detail, her recollection has remained consistent and detailed, and he was clear in her identification. Overall, the Court below was convinced that the reliability of the identification outweighed any possibility of suggestiveness. Having had an independent opportunity to view the witness, this Court concurs with that determination. For those reasons, the identification process does not provide a basis for post-conviction relief.

2. Other Physical Evidence Inconsistencies

The other physical evidence that the Petitioner touched upon at the postconviction hearing was the testimony of the investigating officers concerning the number of vials of blood that they transported from the autopsy to the State Police Laboratory. The Court has had an opportunity to review the trial and post-conviction testimony on this point, and to evaluate the testimony at trial concerning the number of vials and the color on the caps that were in use. There simply is no evidence of any perjury in respect to the minor discrepancies in testimony on this point, which were later clarified. Further, there is nothing to demonstrate any impact on the outcome of the trial or

possible prejudice to the Petitioner from this minor discrepancy.

Petitioner references other similar discrepancies in testimony. These are best describes as minutia that only become apparent when one has the opportunity to pore over a transcript of proceedings repeatedly and at leisure. These minor inconsistencies do not provide grounds for relief.

3. Ineffective Assistance of Appellate Counsel

The Petition raises an exhaustive list of claims for ineffective assistance by appellate counsel. In assessing the performance of appellate counsel, the Strickland standard also applies. Thus the issue is whether counsel was deficient, and if so, whether there is a substantial possibility that the deficiency impacted the outcome on appeal. Wilson v. State, 284 Md. 664 (1979), cert. denied, 446 U.S. 921 (1980); State v. Calhoun, 306 Md. 692 (1986), cert. denied, 480 U.S. 910 (1987). The specific lapses outlined in the Petition are:

- Failure to litigate the speedy trial ruling – As no inordinate delay had occurred, and there was no showing of prejudice occasioned by any delay, this was not a viable argument on appeal. Petitioner's only real argument of prejudice relates to the fact that Hassan Stewart was not available to testify at the retrial. However this was occasioned by his hospitalization during the trial, not by the fact that the retrial was

delayed. Further, his testimony was preserved from prior proceedings and was read to the jury. This would not have posed a viable argument on appeal.

- Failure to challenge Motion in Limine Ruling concerning investigation relating to Herbert Ryan as a possible suspect – There simply was no admissible evidence to link Ryan to the investigation, and the ruling below would have been affirmed on appeal.

- Failure to challenge suppression of introduction of chain of custody evidence concerning vials of blood – As stated previously, this was not an issue of significance and would not have warranted reversal.

- Failure to challenge voir dire questions – Petitioner lists numerous questions that it claims were not asked, and argues that this issue would have been successful if challenged on appeal. However the transcript of the jury selection proceedings demonstrates that the Court's questions, while perhaps not worded identically to those submitted by defense counsel, fairly covered critical items raised in this Petition, e.g. relationship with law enforcement (November 13, 1995 transcript, pp. 23-25); whether panel members had been charged with or convicted of a crime (*Id.* p.32); whether they would give greater weight to testimony of State or defense witnesses (*Id.* p.35). The Court's voir dire was fully adequate,

and there was no viable appellate claim on this issue.

- Failure to challenge "rush to judgment" argument – There is no law to support the claim that this was a viable argument that could lead to reversal on appeal.

- Failure to challenge denial of motion for mistrial relating to loss of Kulbicki's coat – As previously stated, this was not an issue that warranted mistrial. The lost coat was dealt with effectively by stipulation, thus eliminating any basis for appeal.

- Failure to challenge denial of motion for judgment of acquittal – There was no legal basis to prevail on this claim.

- Failure to challenge denial of mistrial based upon Hassan Stewart's unavailability – The trial Court had wide latitude in dealing with this unexpected development at trial, and there is no case law to support the claim that denial of the mistrial was reversible error.

4. Failure to Investigate

The principal argument advanced under this heading is that counsel failed to investigate whether Hassan Stewart's daughter could have been a favorable witness. Petitioner argues she could have supported the testimony of her father, which was read to the jury at trial. However beyond speculation,

Petitioner has offered proof of this claim. Thus it affords no basis for relief.

Petitioner also argues failure to offer Defense Trial Exhibit 25, showing a discrepancy in the count of fragments. Once again, this argument was raised at trial, and there is no reasonable likelihood that the failure to introduce the exhibit that was referenced at trial somehow impacted the outcome of the trial.

5. Cumulative Effect of Errors

Absent some showing of error giving rise to relief, the cumulative effect of non- substantive complaints does not rise to the level of constitutional error. Gilliam v. State, 331 Md. 651, cert. denied, 510 U.S.1077 (1994)

6. Allegations of Prosecutorial Misconduct

The Petitioner has challenged various inconsistencies by re-casting them as "prosecutorial misconduct," as follows:

- "False" statements in the affidavit in support of the search and seizure warrant – Petitioner failed to demonstrate such falsity at the hearing, or that it was a knowing statement.

- "Suborning perjury" from police witnesses on the number of vials of the victim's blood – The seeming discrepancy on this point was explored at the post-conviction hearing, and this Court finds no evidence of perjury.

- Failure to disclose hair and trace evidence – The argument on this point amounts to nothing beyond mere speculation.

- Loss or destruction of Kulbicici's coat – The evidence presented, both at retrial and in argument, is that the coat was made available for defense counsel to retrieve after the first trial, and it disappeared. The loss was dealt with by stipulation at the retrial, and the argument that the presence of the actual coat would have somehow impacted the outcome is speculation that is not supported by the evidence.

- Improper rebuttal evidence. – Petitioner argues that the rebuttal evidence from Detectives Ramsey and Cappel was in violation of the sequestration order. There is no showing of any impropriety arising from the fact that they were re-called on the issue of the blood vials, or that testimony on this minor issue impacted the outcome of trial.

- Failure to disclose third vial of victim's blood – This point is nothing more than a re-statement of the blood vial issue, and does not give rise to a claim for relief.

- References to first trial – Petitioner argues some nebulous prejudice from references to prior trial testimony, yet fails to demonstrate how this was prejudicial.

- Improper rebuttal argument – To the extent that some portion of the rebuttal argument of the State may have been objectionable, it was not preserved, and it also does not come close to the level of impropriety that had any reasonable probability of impacting the outcome of these proceedings.

7. Failure of the Appellate Court to Reach Issues

Petitioner also argues that failures by the appellate court to reach issues on appeal gives rise to a basis for relief. The first of these again relates to the issue of the vials of the victim's blood. The discrepancy was appropriately explained, and this issue simply does not accord a basis for relief. Similarly, denial of Petitioner's Motion for mistrial on this issue is not a matter on which appellate relief would or should have been granted.

V. Conclusion

The most troubling aspect of this Petition is the information now available that undermines the reliability of CBLA evidence that was significant in the proof that was advanced by the State at trial. However relief on the grounds of newly discovered evidence is distinguishable from relief afforded under the Post Conviction Statute, and Petitioner is not eligible to petition for a new trial under Maryland Rule 4-331. For the reasons stated above, this Court does not find that the Petitioner is entitled to Post-Conviction relief. Therefore, the Petition for

Post-Conviction Relief is denied.

1/2/08
Date

Kathleen Gallogly Cox
Judge